

No. 12531

United States
Court of Appeals
For the Ninth Circuit.

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY, a Corporation,
Appellant.

vs.

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,
Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

JUL 10 1950

PAUL P. O'BRIEN,

No. 12531

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of the United States, Northern
District of California, Southern Division

No. 28769R

BERTHA LEE PORTER, as Special Adminis-
tratrix of the Estate of Charles E. Porter, De-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

COMPLAINT

Comes now the plaintiff above named and for
cause of action against the above-named defendants
alleges as follows:

As a First Cause of Action

I.

That at all times hereinafter mentioned,

(a) The defendant, The State Farm Mutual
Automobile Insurance Company (hereinafter re-
ferred to as "Company"), was and now is a cor-
poration duly organized and existing according to
the laws of the State of Illinois and authorized to
conduct and were and still are conducting an auto-

mobile insurance business in the City of Berkeley, County of Alameda, State of California;

(b) Wilbur M. Mehlin and First Doe were husband and wife (hereinafter referred to as "Mehlin") and the owners of that certain Ford automobile hereinafter mentioned;

(c) Duane R. Claggett was driving and operating said Ford automobile with the permission of said defendants "Mehlin";

(d) That the amount in controversy herein, inclusive of costs and interest, exceeds the sum of \$3,000.00;

(e) That on the 12th day of July, 1948, the Superior Court of the State of California in and for the County of Contra Costa duly made and entered its order appointing Bertha Lee Porter special administratrix of the estate of Charles E. Porter, deceased.

II.

That plaintiff is informed and believes and upon such information and belief alleges that on the 22nd day of August, 1947, defendant "Company" in consideration of a premium of \$23.70 to it paid by defendants "Mehlin" issued to "Mehlin" its standard service automobile policy No. 72-064-ST-27 whereby defendant "Company" agreed for a period of six months, beginning on the 22nd day of August, 1947, and ending on the 22nd day of February, 1948, to pay on behalf of "Mehlin" all sums which "Mehlin" might become obligated to pay by reason of the liability imposed upon them by law for dam-

ages because of bodily injury, sickness or disease, including care, loss of services and death, at any time sustained by any person or persons, caused by accident or arising out of the ownership, operation, maintenance or use of said Ford automobile and said policy also contained an omnibus clause agreeing to pay on behalf of any person other than said owners of said Ford automobile all sums, not to exceed the sum of \$10,000.00 for the death of one person, which such other person became so obligated to pay arising out of the use of such Ford automobile, provided the actual use of said Ford automobile was with the permission of "Mehlin."

III.

That thereafter on the 31st day of October, 1947, said Claggett was driving said automobile at the intersection of South 47th Street and Access Highway in the City of Richmond, County of Contra Costa, State of California, and Charles E. Porter was crossing said intersection on foot and at said time and place said Claggett so carelessly drove and operated said automobile that the same through the carelessness and negligence of said Claggett ran into and collided with said Charles E. Porter, thereby injuring said Charles E. Porter and as a proximate result thereof Charles E. Porter died on the 1st day of November, 1947, and left surviving him as his only heirs at law plaintiff, his wife, and his children, Charles Earl Porter, a minor, John Richard Porter, a minor, and Patricia Sue Porter, a minor.

IV.

That thereafter on or about the 19th day of December, 1947, plaintiff instituted an action against said Claggett to recover damages for the death of said Charles E. Porter and thereafter on the 29th day of September, 1948, judgment was rendered in said action in favor of plaintiff and against said Claggett for the sum of \$30,000.00 and costs of suit, which were taxed at the sum of \$121.74, and that no part of said judgment or of said costs of suit has been paid.

V.

That said "Mehlin" have performed all the terms and conditions upon their part to be performed under said standard service automobile policy.

As a Second Cause of Action

I.

Plaintiff realleges, reaffirms and readopts as a part hereof all of the allegations contained in Sub-paragraphs (a), (b), (d), and (e) of Paragraph I, and Paragraphs II, III, IV and V of the First Cause of Action as if the same were specifically set forth herein.

II.

That at all times since July 7, 1948, defendant "Company" has denied all liability under said policy to plaintiff upon the ground that at the time of said accident, Claggett was not using said Ford Automobile with the permission of Wilbur Mehlin.

III.

That the defendant "Company" waived and is estopped from relying on the condition of said policy requiring the use of said automobile to be with the permission of "Mehlin" as follows:

That immediately following said accident said "Mehlin" and Claggett notified the defendant "Company" that said accident occurred on the 31st day of October, 1947, and thereupon said defendant "Company" by its agents, duly authorized thereto, pursuant to said policy, investigated said accident by interviewing said Claggett, "Mehlin" and witnesses to said accident, including the investigating police officers, and at all times after notice of such accident, defendant "Company" had full opportunity to ascertain if Claggett was using said Ford automobile with permission of said Wilbur Mehlin, and did ascertain that Claggett was driving the same with permission of "Mehlin" and each thereof, and thereafter on or about the 30th day of December, 1947, an agent of said defendant "Company" duly authorized thereto interviewed the attorneys for plaintiff and stated to and informed said attorneys that said Claggett was driving said automobile with the permission of "Mehlin" and that there was no dispute as to the permissive use of said automobile by Claggett and that said defendant "Company" would pay to the heirs at law of said Charles E. Porter the sum of \$7,500.00 in full settlement of any and all claims that such heirs had against said Claggett by reason

of the death of said Charles E. Porter, and that at said time said attorneys informed said agent that said action could not be settled for less than the limits of said insurance policy and said agent informed said attorneys that he would have to contact the office of defendant "Company" in Bloomington, Illinois, as the policy was issued by its office there and that the office of said "Company" in said City of Berkeley, California, did not have power to increase said offer without the approval of said office at Bloomington, Illinois; that plaintiff and her attorneys at all times since said 30th day of December, 1947, have in good faith relied upon the representations of said agent that said use of said Ford was with the permission of "Mehlin" and have made no effort to secure evidence as to the permission to Claggett to use such Ford, and that evidence of such permission can be secured, if at all, with extreme difficulty and great expense, and the opportunity of plaintiff to obtain evidence concerning such use has been materially prejudiced by said representation of said agent and the acts and conduct herein set forth of said agents and attorneys for defendant "Company," upon which representation and conduct plaintiff has relied.

On the 13th and 22nd days of January, 1948, the same agent for said company again informed attorneys for plaintiff that said defendant would pay said sum of \$7,500.00 in full settlement to the heirs of said Charles E. Porter; that on the 28th day of January, 1948, another agent of said defendant

“Company” informed said attorneys that the board of said defendant “Company” was holding a meeting and they would ascertain whether they could pay anything in excess of the sum of \$7,500.00 in settlement of said claim; that thereafter on the 5th day of February, 1948, the agents of said company informed said attorneys that they could not increase the offer to settle the said action in excess of \$7,500.00 and that if the heirs of said decedent would not take said sum in full settlement, it would be necessary to refer such action to the “Company’s” attorneys for its defense, and requested the attorneys for said heirs to extend the time of said defendant Claggett to answer the summons and complaint in said action to and including the 17th day of February, 1948, and said attorneys for said heirs executed a stipulation in writing extending the time of defendant to answer to and including the 17th day of February, 1948; that thereafter said defendant “Company” employed the law firm of Dana, Bledsoe and Smith to defend said Claggett pursuant to the terms of said policy. On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said “Company” prepared an Answer to such complaint on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Ford with the permission of “Mehlin” and Paul C. Dana, of the firm of Dana, Bledsoe & Smith, verified such Answer on behalf of said Claggett; that thereafter on February 25, 1948, said Dana, Bledsoe & Smith requested that a

deposition be arranged of plaintiff for Friday, March 26, 1948, at 4 p.m. at said Dana's office; that thereafter on the 9th day of March, 1948, said Dana, Bledsoe & Smith informed attorneys for plaintiff that the action was one which they desired to settle on behalf of said Claggett and that they would endeavor to settle the same; that on the 12th day of March, 1948, said Dana, Bledsoe & Smith entered into a written stipulation that said action be set for trial on the 7th day of July, 1948, and pursuant to such stipulation, said action was set for trial on the 7th day of July, 1948; that during the week of June 28, 1948, said attorneys for Claggett requested attorneys for plaintiff for a continuance of the trial of such action on the ground that Paul C. Dana was handling the defense of the case and that said Dana had been on trial for several weeks and his health required him to take a vacation and he could not try such action on July 7, 1948. That on or about the 3rd day of July, 1948, said attorneys for Claggett informed said attorneys for plaintiff that they would not be able to try said action on the 7th day of July, 1948, as they had not been able to locate said Claggett and that it would be necessary to have a continuance; that thereafter on or about the 7th day of July, 1948, said attorneys for Claggett prepared an Affidavit on behalf of said Claggett and on said day presented a Motion for a continuance to said Superior Court and thereafter said Superior Court continued such action to the 14th day of July, 1948,

upon condition that said Claggett pay the expenses of plaintiff by reason of said continuance, and said attorneys for said Claggett agreed to pay such expenses; said Dana, Bledsoe & Smith defended said action on said 14th day of July, 1948, on behalf of said Claggett; on the 26th day of July, 1948, said Dana, Bledsoe & Smith paid the sum of \$99.50 on account of such expenses, and after the rendition of judgment therein made a Motion for a new trial on behalf of said Claggett and argued the same to said Superior Court; that said Motion for New Trial was denied by said Superior Court and since the denial of said Motion for New Trial said Dana, Bledsoe & Smith have withdrawn as attorneys for said Claggett and said defendant "Company" has paid said Dana, Bledsoe & Smith in full for their services as attorneys for said Claggett under said policy;

That said defendant "Company" has waived said permissive use provision of its policy and is estopped by the foregoing conduct of said agents and attorneys on its behalf from denying its liability under said policy.

Wherefore said plaintiff prays judgment against said defendant for the sum of \$30,000.00 together with costs of suit herein.

Dated: April 4, 1949.

/s/ AUGUSTUS CASTRO,
COOLEY, CROWLEY &
GAITHER,
Attorneys for Plaintiff.

Demand for Trial by Jury

Pursuant to Rule 39 (b) of the Federal Rules of Civil Procedure, plaintiff above named demands a trial by jury as to any and all issues in the above-entitled matter.

/s/ AUGUSTUS CASTRO,
COOLEY, CROWLEY &
GAITHER,
Attorneys for Plaintiff.

[Endorsed] Filed, April 6, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, THE STATE
FARM MUTUAL AUTOMOBILE INSUR-
ANCE COMPANY, TO COMPLAINT

Defendant, The State Farm Mutual Automobile Insurance Company, for its answer to the complaint in the above-entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant denies each and every allegation contained in subparagraphs (b) and (c) of paragraph I of the first alleged cause of action of said complaint.

II.

This defendant denies each and every allegation contained in paragraphs II and V of the first

alleged cause of action of said complaint; and, in this connection, this defendant alleges that policy No. 72-064-ST-27 issued to Wilbur Mehlin by defendant contained a declaration numbered 1, as follows:

“The automobile will be principally garaged and used in the above town, county and state.”

The automobile referred to in declaration numbered 1 is a Ford, 1936, two door, eight cylinder, Serial No. 2922886, and is the Ford automobile referred to in the complaint. The town, county and state referred to in declaration numbered 1 is specified in the schedule of declarations as Lancaster County, Lincoln, Nebraska. The above-mentioned insurance policy was issued by defendant in reliance upon the statements in the declarations, including the statement in declaration numbered 1. This defendant is informed and believes, and, upon such information and belief, alleges that on October 31, 1947, and for some time prior thereto, the said automobile was not being principally garaged and used in the County of Lancaster, City of Lincoln, State of Nebraska, but was on the contrary being principally garaged and used in the City of Richmond, County of Contra Costa, State of California, in violation of declaration numbered 1 in said policy and without the knowledge or consent of defendant.

Further, in this connection, this defendant alleges that the schedule of declarations contains the statement that there are no exceptions to the statements and declarations therein. The declaration numbered 4 in said policy is as follows:

“The automobile described herein is fully owned by the insured unless otherwise stated in the exceptions above. If a mortgage owner, conditional vendor or assignee, such as bank of finance company is named above, loss, if any, under Coverage B shall be payable to the named insured and to such additional interest as their interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error or inadvertence in the description of the automobile until after notice of cancelation of the policy or this agreement shall be given to such mortgage owner, conditional vendor, mortgagee or assignee in the same manner as required to be given to the named insured.”

It is stated that there are no exceptions to said declaration numbered 4, but defendant is informed and believes, and, upon such information and belief, alleges that said declaration numbered 4 was untrue in that there was a mortgage on said automobile during the month of October, 1947, with the First National Bank of Lincoln, Nebraska, and by reason thereof the terms and provisions of said insurance policy were violated and the statements and declarations in said policy were untrue.

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph III of the first alleged cause of action of said complaint,

and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraph III.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

“and that no part of said judgment or of said costs of suit has been paid.”

V.

As and for a Further and Separate Defense, this defendant alleges, upon information and belief, that the Ford automobile referred to in the complaint as being driven by Claggett at the time of the accident was being driven without the permission or consent of Wilbur M. Mehlin and wholly without his knowledge; and, in this connection, said automobile had been removed from the State of Nebraska by the wife of Wilbur M. Mehlin without the knowledge, consent or permission of said Wilbur M. Mehlin and contrary to the laws of said State of Nebraska, and contrary to the terms and provisions of the mortgage contract applying to said vehicle at said time, and further in that connection, that at said time while said vehicle was being operated in California said wife of Wilbur M. Mehlin

had left the State of Nebraska with the purpose and intent of leaving and deserting her said husband, Wilbur M. Mehlin, and with the purpose and intent of abandoning her household in the State of Nebraska and of separating from her husband, and further in this connection, this defendant is informed and believes, and, upon such information and belief, alleges that the said wife of Wilbur M. Mehlin was not at the time she gave permission to Claggett to operate said automobile, nor at any time while she was in California, nor at the time of the happening of the accident referred to in the complaint residing in the same household as Wilbur M. Mehlin.

In connection with the foregoing separate defense, section 8 of conditions in said insurance policy hereinabove referred to provides as follows:

“Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.”

The insuring agreement of said policy provides as follows:

“State Farm Mutual Automobile Insurance Company agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the

statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy: * * *''

As to Second Alleged Cause of Action

I.

For its answer to paragraph I of the second alleged cause of action of said complaint, this defendant hereby repeats and makes a part hereof all of its foregoing denials, allegations, admissions and separate defense contained in its foregoing answer to Sub-paragraph (a), (b), (d) and (e) of Paragraph I, and Paragraphs II, III, IV and V of the first alleged cause of action of said complaint.

II.

Answering the allegations of paragraph II of the second alleged cause of action of said complaint, defendant admits that it has denied all liability under the policy herein referred to, but denies that it specified the limited ground that Claggett was not using the Ford automobile with the permission of Wilbur Mehlin.

III.

This defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

“That the defendant ‘Company’ waived and is estopped from relying on the condition of said

policy requiring the use of said automobile to be with the permission of 'Mehlin' as follows:

"That immediately following said accident said 'Mehlin' and Claggett notified the defendant 'Company' that said accident occurred on the 31st day of October, 1947, and thereupon said defendant 'Company' by its agents, duly authorized thereto, pursuant to said policy, investigated said accident by interviewing said Claggett, 'Mehlin' and witnesses to said accident, including the investigating police officers, and at all times after notice of such accident, defendant 'Company' had full opportunity to ascertain if Claggett was using said Ford automobile with permission of said Wilbur Mehlin, and did ascertain that Claggett was driving the same with permission of 'Mehlin' and each thereof, and thereafter on or about the 30th day of December, 1947, an agent of said defendant 'Company' duly authorized thereto interviewed the attorneys for plaintiff and stated to and informed said attorneys that said Claggett was driving said automobile with the permission of 'Mehlin' and that there was no dispute as to the permissive use of said automobile by Claggett and that said defendant 'Company' would pay to the heirs at law of said Charles E. Porter the sum of \$7,500.00 in full settlement of any and all claims that such heirs had against said Claggett by reason of the death of said Charles E. Porter, and that at said time said attorneys informed said agent that said action could not be settled for less than the limits of said insurance policy and said agent informed said at-

torneys that he would have to contact the office of defendant 'Company' in Bloomington, Illinois, as the policy was issued by its office there and that the office of said 'Company' in said City of Berkeley, California, did not have power to increase said offer without the approval of said office at Bloomington, Illinois;"

At all times denying representations as alleged by plaintiff in paragraph III of the second alleged cause of action of said complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the following allegations, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

"that plaintiff and her attorneys at all times since said 30th day of December, 1947, have in good faith relied upon the representations of said agent that said use of said Ford was with the permission of 'Mehlin' and have made no effort to secure evidence as to the permission to Claggett to use such Ford,"

Answering the following allegations of paragraph III of the second alleged cause of action of said complaint:

"and that evidence of such permission can be secured, if at all, with extreme difficulty and great expense"

defendant alleges no permission was given by Wilbur Mehlin for the operation of the vehicle therein referred to on the part of Claggett and further alleges that any and all evidence on the

subject of permission that was available to defendant was also available to plaintiff and plaintiff's attorneys, and said evidence is still available and can be secured with little difficulty and small expense.

This defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

"the opportunity of plaintiff to obtain evidence concerning such use has been materially prejudiced by said representation of said agent and the acts and conduct herein set forth of said agents and attorneys for defendant 'Company' upon which representation and conduct plaintiff has relied."

Answering the following allegations of paragraph III of the second alleged cause of action of said complaint:

"On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said 'Company' prepared an Answer to such complaint on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Ford with the permission of 'Mehlin' and Paul C. Dana, of the firm of Dana, Bledsoe & Smith, verified such Answer on behalf of said Claggett";

defendant admits said allegations; and, in this connection, alleges that at the time said answer was prepared and filed neither defendant, nor its attorneys, had any information or knowledge concerning the circumstances of the removal of the said Ford automobile from the State of Nebraska

to the State of California, and, in fact, had only the information from Mrs. Wilbur Mehlin that the automobile in question was being driven with her permission, and that she was the wife of the policy holder and further, in this connection, it is alleged that the answer hereinabove referred to was amended and said amendment was made upon notice and motion and affidavit and upon the order of the Court in which said action was pending, all of which more particularly appears in said action reference to which is hereby made, and the records of said action are by this reference incorporated herein as though set forth at length.

Answering the allegations of paragraph III of the second alleged cause of action of said complaint, commencing on page 6, line 9, with the word "that" and ending on page 7, line 16, with the word "policy," defendant alleges that its attorneys received the file on this case on or about February 7, 1948; that neither the investigation on the facts, nor the investigation on the law relating to the above subject matters had been completed at the time of the commencement of the trial of said action for the reason that neither Claggett nor Mrs. Wilbur Mehlin could be located in the State of California; that defendants attorneys requested a continuance of the trial from July 7, 1948, because of their inability to locate Claggett, and said request for a continuance was refused by the attorneys for the plaintiffs in said action; that the attorneys for defendant thereupon filed an affidavit in support of a motion for a continuance which said affidavit was as follows:

“State of California,

“City and County of San Francisco—ss.

“Leighton M. Bledsoe, being duly sworn, deposes and says:

“That he is an attorney licensed to practice in the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, who are attorneys for defendant Claggett in the above-entitled action; that affiant’s partner, Paul Dana, has been almost continuously engaged in trial on various cases throughout the latter part of April and through the months of May and June, 1948; that affiant was asked by Mr. Dana at 4:55 p.m. Friday, July 2nd, 1948, to look at the file in the above-entitled case to see if the case was in a proper state for trial and to see if affiant could try the said case on July 7th, 1948; that said Paul Dana advised affiant that he had been trying to get the trial of this case continued until he could return from his vacation, but that a continuance had been refused by counsel for the plaintiffs; that he had been waiting for a report on the law regarding said case but it had not been reviewed nor completed;

“That affiant took the file home the evening of July 2nd and reviewed it; that affiant found the status of the case to be as set forth in Mr. Paul Dana’s affidavit filed herewith; that affiant telephoned to Mr. Louis V. Crowley, one of counsel for plaintiffs in said action, on Saturday morning, July 3rd, 1948, and advised Mr. Crowley of the facts related in Mr. Dana’s affidavit, and advised Mr.

Crowley that affiant would ask the Court on the morning of trial for leave to amend the answer of defendant Claggett along the lines suggested in Mr. Dana's affidavit."

LEIGHTON M. BLEDSOE.

"Subscribed and sworn to before me this 6th day of July, 1948.

[Seal] MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California."

That the affidavit of Paul C. Dana therein referred to was as follows:

"State of California,

"City and County of San Francisco—ss.

"Paul C. Dana, being duly sworn, deposes and says:

"That he is an attorney licensed to practice in the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, attorneys for Defendant Duane R. Claggett in the above-entitled action; that he is the attorney to whom this case was assigned for handling; that he prepared and verified the answer of Duane R. Claggett in February, 1948; that at said time the file on said action then in affiant's possession indicated that the automobile driven by said defendant at the time of the accident was owned by Wilbur Marvin Mehlin and that it was being driven by defendant Claggett with the consent of Mehlin's wife at the

time of the accident; that the circumstances of how the wife had possession, or of how she was empowered to give permission for the use of said automobile were not then revealed in affiant's file; that affiant prepared the answer upon information contained in the file and for that reason admitted that the automobile was *bring* driven with the consent of the defendant Wilbur M. Mehlin; that affiant had not consulted defendant Claggett before preparing and signing said answer; that affiant is informed and believes and upon such information and belief alleges that defendant Claggett can only say that he was driving the car with the permission of Mrs. Mehlin; that shortly after April 19, 1948, affiant received a letter from attorneys Ginsburg and Ginsburg of Lincoln, Nebraska, advising affiant that they were attorneys for defendant Wilbur Mehlin and setting forth the following information:

“‘For your information, the automobile in question was removed from the State of Nebraska by Mrs. Mehlin some time in October, 1947, and without the consent of her husband. This was the aftermath of some domestic difficulty. While in California, Mrs. Mehlin apparently allowed others to use the vehicle, and while it was so used, with her consent, but for no purpose or end of hers, the vehicle was involved in the accident in question. Subsequently, Mr. Mehlin had Mrs. Mehlin arrested for removing a mortgaged vehicle out of the State of Nebraska, and Mrs. Mehlin was brought back to this State.’

“That affiant is informed and believes and upon such information and belief alleges the fact to be that no service of process has been made in this case upon defendant Wilbur M. Mehlin nor upon his wife;

“That following receipt of the foregoing letter affiant caused an investigation to be made into the legal aspects of the alleged permissive use of the automobile in question; that the law of Nebraska will be involved; that one of affiant’s associates has examined the law of California and reported thereon to affiant, but the law of Nebraska has not yet been ascertained by affiant; that it may become important to the other defendants named in this case and not yet served as to whether defendant Claggett had the permission of defendant Wilbur M. Mehlin to use the automobile at the time and place of the accident; that affiant expects to be asked to represent the defendant Wilbur M. Mehlin in this action when or if said defendant is served with process therein;

“That affiant now believes that the admission made in the answer to defendant Claggett to the effect that said Claggett was driving the automobile with the consent and permission of defendant Wilbur M. Mehlin is untrue, incorrect, and in error; that defendant Claggett can only admit that he was driving said automobile with the permission and consent of Mrs. Mehlin; that the ends of justice and the interests of truth require that said answer be amended for the purpose of changing the admis-

sion made by defendant Claggett to the limited effect that said automobile involved in the accident was owned by Wilbur M. Mehlin and was being driven at the time of the accident in question by defendant Duane R. Claggett with the consent and permission of Mrs. Wilbur M. Mehlin.

“Wherefore, affiant prays for leave to amend the answer of defendant Claggett as herein indicated.

“PAUL C. DANA.

“Subscribed and sworn to before me this 2nd day of July, 1948.

“[Seal] MARIE H. STANLEY,
“Notary Public in and for the City and County of
San Francisco, State of California.”

That the attorneys for the defendant were ordered to pay the expenses of plaintiff by reason of the continuance and the said expenses were paid as ordered; that Claggett was first interviewed by defendant's attorneys July 13, 1948, the day before the trial of said action; that on said date a reservation of rights agreement was executed by Claggett, the terms of which are as follows:

“Messrs. Dana, Bledsoe & Smith

* * *

“This is to advise you that I agree that your firm, as attorneys and representatives of State Farm Mutual Auto Insurance Company, and also that any of your representatives and any representatives of State Farm Mutual Auto Insurance Company, may participate in any investigation, de-

fense and/or adjustment of the case now pending between Bertha Lee Porter and Charles Earl Porter and John Richard Porter, Minors, by and through Bertha Lee Porter, their Guardian ad Litem, Plaintiffs, vs. Duane R. Claggett, Wilber M. Mehlin, Marvin Mehlin, et al., Defendants, which said case is now pending in the Superior Court of the State of California, in and for the County of Contra Costa, numbered therein 41468, and any such action heretofore taken or to be taken, by you or by any of said representatives is entirely without prejudice to any rights and defenses of the State Farm Mutual Auto Insurance Company under its insurance policy numbered 72-064-ST-27 and any other insurance contract; and it is agreed that any such participation does not and will not constitute an admission of liability on the part of said State Farm Mutual Auto Insurance Company under said and any contract of insurance. I likewise hereby waive any right that I have, or may have, to claim that the State Farm Mutual Auto Insurance Company has waived any right to deny liability under said and any contract of insurance.

“At the same time I in no way waive any of my rights against the State Farm Mutual Auto Insurance Company under said or any contract of insurance.”

That at the time the motion for continuance was made defendant's attorneys fully advised the attorneys for the plaintiff of the position of the

insurance company, defendant herein, with reference to lack of coverage; that thereafter and before the trial of said action the attorneys for the plaintiff waived a jury trial; that the attorneys for the defendant at all times subsequent to the time of making the motion for continuance continued to advise and reiterate to the attorneys for the plaintiff that there was no insurance coverage and that all actions being taken by defendant and its attorneys in said proceedings were being taken under full reservation of rights and solely for the purpose of fulfilling the obligation of attorney and client as between said attorneys and Claggett, and for the further purpose of allowing Claggett plenty of time to secure other attorneys should he so desire and for the purpose of taking any appeal from the judgment entered in said action that he might desire.

Further answering said allegations in paragraph III of the second alleged cause of action of said complaint, defendant denies that the payment of its attorneys for their services was made on behalf of Claggett under its policy of insurance.

Defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

“That said defendant ‘Company’ has waived said permissive use provision of its policy and is estopped by the foregoing conduct of said agents and attorneys on its behalf from denying its liability under said policy.”

IV.

As and for a Further and Separate Defense, this defendant alleges that its insurance policy, being policy numbered 72-064-ST-27 issued to Wilbur Mehlin on or about August 22, 1947, on a 1936 Ford, two door sedan, contained the following conditions:

“8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.”

That the terms and conditions of said policy more particularly appear in Exhibit “A,” attached hereto and incorporated herein as though set forth at length; and, in this connection, defendant alleges that no changes were made on said policy, other than those that appear from said exhibit herein referred to.

Wherefore, this defendant prays that plaintiff take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,

Attorneys for Defendant, The State Farm Mutual
Automobile Insurance Company.

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that said Dana, Bledsoe & Smith are the attorneys for the defendant, The State Farm Mutual Automobile Insurance Company; that the officers of said defendant are absent from said City and County of San Francisco, where affiant has his and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of said defendant; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

/s/ LEIGHTON M. BLEDSOE.

Subscribed and sworn to before me this 25th day of May, 1949. .

[Seal] /s/ HAZEL E. THOMPSON,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

Standard Service Automobile Policy

State Farm Mutual
Automobile Insurance Company
Bloomington, Illinois
Insuring Agreements

Agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Coverage A. Liability or Loss Caused by Any
Private Passenger Automobile

1. Liability: To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury, sickness or disease, including care, loss of services, and death at any time resulting therefrom, sustained by any person or persons and injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, operation, maintenance or use of

Any Private Passenger Automobile.

2. Medical Payment: To pay the reasonable expense of the necessary medical, surgical, dental, ambulance, hospital and professional nursing services and, in the event of death the reasonable

funeral expense, all incurred within one year from the date of the accident, to or for each person who sustains bodily injury caused by accident and arising out of the operation by the insured of

Any Private Passenger Automobile.

3. Bail Bond Expense: To reimburse the insured for 80% of the amount of any premium or fee paid for a bail bond required of him because of an accident or traffic violation arising out of the use of

Any Private Passenger Automobile.

Coverage B. Damage to or Loss of Described Automobile

4. Comprehensive: To pay for any direct and accidental loss of or damage to the described automobile, hereinafter called loss, but not including loss caused by collision of the described automobile with another object or by upset of the described automobile.

5. Loss of Use: To reimburse the named insured for the expense incurred by him for the rental of a substitute private passenger automobile, including taxicab expense, necessitated by a theft of the entire described automobile.

6. Emergency Road Service: To reimburse the insured for 80% of the expense incurred in connection with the described automobile and away from any garage or service station on account of: (1) delivery of gasoline, oil or loaned battery or

change of tire; (2) mechanical first aid on the highways for a period not exceeding one hour after arrival of mechanic if automobile cannot be operated; (3) towing to nearest garage or service station if automobile will not operate under its own power.

Supplementary Agreements

1. Defense, Settlement, Supplementary Payments: As respects such insurance as is afforded by the other terms of this policy

(a) under Coverage A (1) The Company shall

1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not

exceed the limit of the Company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(b) the Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The Company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company's rights nor estop it from asserting any defense under the policy.

2. Definition of "Insured": The unqualified word "insured" wherever used in Coverage A and in other parts of this policy when applicable to Coverage A includes the named insured and, except where specifically stated to the contrary, also includes

(a) the spouse of the named insured residing in the same household as the named insured.

(b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured.

(c) the employer of the named insured or spouse with respect to the operation of any private passenger automobile by such named insured or spouse or by a private chauffeur or domestic servant thereof or with respect to the presence of such named insured, spouse, private chauffeur or domestic servant in any private passenger automobile.

3. Automatic Insurance for Newly Acquired Automobiles: If the named insured disposes of the described automobile and purchases or acquires title to another private passenger automobile to replace it, this policy will automatically terminate with respect to the described automobile and will automatically extend to cover the replacing automobile provided the Company is notified within thirty days of such purchase or acquisition and provided the named insured pays any additional premium that may be required because of such change upon demand.

4. Financial Responsibility Laws: Such insurance as is afforded by this policy under Coverage A (1) shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, operation, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the

Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability

The Company's Limit of Liability Under Coverage A

1. (Liability) for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident shall not exceed \$10,000; subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident shall not exceed \$20,000; and for all damages, including loss of use, arising out of injury to or destruction of property in any one accident shall not exceed \$5,000. The inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability.

2. (Medical Payments) shall not exceed \$500 for all expense incurred by or on behalf of each person who sustains bodily injury including death resulting therefrom. The inclusion herein of more than one insured shall not operate to increase the limit of the Company's liability.

3. (Bail Bond Expense) shall not exceed 80% of the actual amount paid as a premium or fee for the bail bond required, but the Company shall be under no obligation to apply for or furnish such bond.

Coverage B.

4. (Comprehensive) shall not exceed the actual cash value of the described automobile, or part thereof, at the time of loss nor what it would then cost to repair or replace the described automobile or part thereof with like kind and quality with deduction for depreciation.

5. (Loss of Use) shall not exceed \$5 for any one day and subject to that limit \$150 or the actual cash value of the described automobile at the time of loss, whichever is less, for the entire period covered. The period covered shall commence seventy-two hours after the loss has been reported to the Company and to the police and terminate on the date the automobile is returned or repaired or on such earlier date as the Company makes or tenders settlement for the loss. Reimbursement shall be made only upon presentation of original rental receipts.

6. (Emergency Road Service) shall not exceed 80% of the actual amount paid for the services indicated and shall not include the cost of oil, gasoline, parts or material, or service rendered at any garage or service station.

Exclusions

This Policy Does Not Apply:

1. Under any coverage (a) to any automobile owned by the named insured or any member of the family of the named insured residing in the same household or furnished for regular use to the named insured or spouse unless such automobile is either specifically described in the Declarations or covered under Supplementary Agreement 3; or (b) when the described automobile is rented or leased;

2. Under Coverage A (1) (a) to bodily injury, sickness, disease or death of the insured or any member of the family of the insured residing in the same household as the insured or to an employee of the insured while in the course of employment in the business occupation of the insured; (b) to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; (c) to any insured operating or employed by an automobile repair shop, public garage, sales agency, service station or public parking place with respect to the operation of any automobile other than the described automobile in the course of such business or employment; or (d) to injury to or destruction of any property being towed or transported by the insured or to any automobile used by the insured;

3. Under Coverage A (2) to bodily injury to or death of any person to or for whom benefits are

payable under any workmen's compensation law because of such injury or death, or to any person while in or upon any other vehicle not insured hereunder;

4. Under Coverages A (1), A (3) while the automobile is operated (a) by any person under the minimum age required to obtain a license to operate a private passenger automobile in the state, federal district or territory, or province in which the automobile is registered or in which the accident occurs, whichever is lower, or (b) by any person under the age of fourteen years;

5. Under Coverage B (4) to loss (a) due to war or civil war, whether or not declared, and arising out of an invasion, attempted invasion, attack or to confiscation by duly constituted governmental or civil authority; (b) due to wear and tear, freezing, mechanical or electrical breakdown or failure, negligent repair or service, or loss of tools or repair equipment, unless such loss is the direct result of a theft, covered by this policy, of the entire automobile; or (c) of tires unless loss is due to fire or theft, or unless the loss be coincident with other loss covered by this policy.

Conditions

1. Policy Period, Territory, Purposes of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of

America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

2. Definitions.

The term "described automobile" means the motor vehicle described in the Declarations and equipment usual to that type of automobile while attached thereto.

The term "Private passenger automobile" means the described automobile and any other automobile of the private passenger type including delivery sedans, panel deliveries, pick-up trucks and station wagons when such vehicles are not used for the wholesale or retail delivery of goods or merchandise.

3. Insured's Duties in Case of Loss. As a condition precedent to the enforcement of any right under this policy, the insured shall

(a) Notify the Company as soon as practicable of all accidents, claim and suits and as soon as requested fill out in detail all Proof of Loss forms required by the Company.

(b) Forward to the Company as soon as practicable every demand, notice, summons or other process received by him or his representative.

(c) Assist and Co-operate with the Company in investigating, securing and giving evidence, and in the conduct of suits and by

attending hearings and trials as well as in obtaining reasonable repairs for the damage done to the described automobile.

(d) Permit the Company to make such investigation, negotiation and settlement of any claim or suit against the insured as may be deemed expedient by the Company.

(e) Not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

(f) Subrogation. The Company shall be subrogated to all the insured's rights of recovery against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

4. Inspection, Repair, Replacement and Abandonment

(a) The Company shall have a reasonable opportunity to examine the automobile after loss and before repairs are started or physical evidence of damage removed but the insured shall not be prejudiced hereunder by any act on his part or in his behalf undertaken for the protection or salvage of the described automobile.

(b) It shall be optional with the Company to order the repair or replacement of the described automobile or part thereof when dam-

aged or stolen, or to pay to the insured in money the amount of the loss against which there is insurance under this policy. In the event of loss under Coverage B, the amount of the loss shall first be applied to any balance of premium owing to the Company for the policy term and the remainder shall be paid to the insured.

(c) There shall be no abandonment to the Company.

5. Action Against Company

(a) With respect to all coverages no action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed.

(b) With respect to Coverage A no action shall lie against the Company until the amount of the insured's obligation to pay shall have been finally determined either by final judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the

Company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

6. Other Insurance.

If, as respects the described automobile, the named insured or spouse has other insurance against loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss;

If, as respects any private passenger automobile other than the described automobile, there exists another policy insuring the named insured or spouse against loss which is also covered by this policy, then the insurance under this policy shall be excess insurance over such other valid and collectible insurance;

If for any insured, other than the named insured or spouse, there exists other valid and collectible insurance against loss covered by this policy, such other insured shall not be covered under this policy against such loss.

7. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the named in-

sured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall cover (1) the named insured's legal representative as the named insured, and (2) under coverage A, subject otherwise to the provisions of Supplementary Agreement 2, any person having proper temporary custody of the automobile, as an insured.

8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.

9. Cancellation. This policy may be canceled by the named insured by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the Company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

Mutual Conditions

1. Membership. The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this Company continues to write such coverages and the insured remains a desirable risk.

While this policy is in force the named insured is entitled to vote at all meetings of members and to share in the earnings and savings of the Company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. No Contingent Liability. This policy is non-assessable.

3. Annual Meetings. The annual meeting of the members of the Company shall be held at its home office at Bloomington, Illinois, on the second Mon-

day of June at the hour of 10:00 a.m., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least ten (10) days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois, and countersigned on the declarations page by a duly authorized agent of the Company.

/s/ R. P. MECHESELE,
President.

/s/ G. E. MECHESELE,
Secretary.

Standard Service Policy
State Farm Mutual
Automobile Insurance
Company

Home Office
Bloomington, Illinois

This Policy is Non-Assessable

With This Policy

You become a member of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, the world's largest automobile mutual insurance company with over a million policyholders and with approximately 7000 agents and claim representatives throughout the country to service you wherever you may travel.

Read Your Policy

This State Farm Mutual Service Policy has been designed for your service and protection. It is believed to be the most modern, streamlined, up to date and yet easily understood policy of automobile insurance available to the public.

Report Every Accident

Report every accident, however slight, on the loss report enclosed with your policy for that purpose. Read carefully "insured's duties in case of loss" in policy and fill in the report according to instructions. Always secure names of disinterested witnesses. If another automobile is involved, secure its license number and the name and address of the driver. If the accident involves bodily injury telephone or telegraph the company at once.

Report New Automobiles or Change of Address

If you purchase an additional private passenger automobile which you desire to insure, notify your agent at once.

If the automobile replaces the automobile described in this policy or if you change your address, notify the Company or your agent using the form enclosed with your policy or a postcard or letter giving the same information.

Comprehensive Residence, Personal and Farm Liability

The State Farm Mutual Automobile Insurance Company has now extended its facilities and service to provide for its policyholders and members, Comprehensive Residence and Personal Liability or Comprehensive Farm and Farm Employer's Liability. Under these forms, the policyholder may insure against virtually every liability arising out of the ownership or maintenance of a home or residence, participation in sports, ownership of a dog or other pet, operation of a bicycle, carriage or cart, or arising out of the operation of a farm including the operation of agricultural equipment, straying of livestock.

These new forms are as simple to understand and yet as broad and liberal in their protection as the new automobile policies.

See Your Agent

Let him explain the advantages of these new forms.

Six Months Short Rate Table Based
on 180 Days

Periods exceeding 20 days, and not exceeding 25 days, to be the rate of 25 days, and so on up to 6 months.

1 day	4%
2 days	6%
3 days	8%
4 days	9%
5 days	10%
6 days	12%
7 days	13%
8 days	14%
9 days	16%
10 days	17%
11 days	17%
12 days	18%
13 days	18%
14 days	19%
15 days	20%— $\frac{1}{2}$ mo.
16 days	22%
17 days	23%
18 days	24%
19 days	25%
20 days	26%
25 days	28%
30 days	30%—1 mo.
35 days	33%
40 days	35%
45 days	38%

50 days	40%
55 days	45%
60 days	50%—2 mos.
65 days	53%
70 days	55%
75 days	58%
80 days	60%
85 days	65%
90 days	70%—3 mos.
105 days	75%
120 days	80%—4 mos.
135 days	85%
150 days	90%—5 mos.
165 days	95%
180 days	100%—6 mos.

General Endorsement

It is agreed that as of the effective date hereof the policy is amended in the following particulars:

In the event of loss or damage covered by the policy, the insured shall, if requested by this Company, replace the property lost or damaged, or furnish the labor and materials necessary for repairs thereto at actual cost to the insured.

Nothing herein contained shall be held to alter, vary, waive or extend any of the terms, conditions, agreements, or limitations of the undermentioned policy other than as above stated.

Effective Date August 22, 1947, 12:01 a.m. Standard Time.

Attached to and forming a part of Policy Number 72-064-ST-27 issued by the State Farm Mutual Automobile Insurance Company, of Bloomington, Illinois, to Wilbur Mehlin of Lincoln, Nebraska.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

/s/ G. E. MECHESELE,
Secretary.

/s/ R. P. MECHESELE,
President.

Countersigned at Lincoln, Nebraska, this 22nd day of August, 1947.

/s/ P. RUNTY,
Authorized Representative.

GEX4.2

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Certified Copy

Standard Service Automobile Policy
State Farm Mutual Automobile Insurance Company
Bloomington, Illinois

Declarations

Policy No. 72-064-ST-27

Name of Insured Mehlin, Wilbur.

Address 210 No. 29th St., Lincoln, Nebraska, Lancaster Co.

Occupation Assembly Man.

Description of All Private Passenger Automobiles Owned by Insured, Spouse or Members of Family Residing in Household to Be Insured Hereunder

Automobile: Make Ford, Yr. '36, Body Style 2 Door, Cyl. 8, Motor or Serial No. 2922886, Cost 350, Purchased 1-46.

Coverages: A. Loss or damage caused by any private passenger automobile. B. Damage to or loss of described automobile not including collision.

Membership 9.00; Premium 23.70.

Term—The term of this Policy shall be from Aug. 22, 1947, to Feb. 22, 1948, and for such succeeding terms of six months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current term and accepted by the Company.

Exceptions—If any, to statements and declarations following: No exceptions.

1. The automobile(s) will be principally garaged and used in the above town, county and state.

2. No insurer has canceled or refused in writing to issue or renew automobile insurance to the insured during the past year.

3. The automobile(s) are to be used for pleasure and business which is defined as personal pleasure family and business use, including loading and unloading and including transportation of friends, neighbors, fellow employees to and from work and school children to and from school on a share ex-

pense, accommodation or exchange hauling basis but does not include use in the business of transporting passengers for hire as a public or livery conveyance.

4. The automobile(s) described herein is fully owned by the insured unless otherwise stated in the exceptions above. If a mortgage owner, conditional vendor or assignee, such as bank or finance company is named above, loss, if any, under Coverage B shall be payable to the named insured and to such additional interest as their interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error or inadvertence in the description of the automobile until after notice of cancelation of the policy or this agreement shall be given to such mortgage owner, conditional vendor, mortgagee or assignee in the same manner as required to be given to the named insured.

Date of Issue August 22, 1947.

Countersigned by

/s/ P. RUNTY.

State of Nebraska,
County of Lancaster—ss.

F. Glen Henderson being first duly sworn upon oath deposes and says he is in full charge of the issuance of insurance policies for the State Farm Mutual Auto Insurance Company in the State of

Nebraska and has carefully compared the attached copy of said policy No. 72-064-ST-27, the original of which was issued to Wilbur Mehlin on August 22, 1947, and covers the period of August 22, 1947, to February 22, 1948, and that same is a true and exact copy of the original policy with all riders or endorsements thereon.

/s/ F. GLEN HENDERSON,
Service Supt.

Subscribed and sworn to before me this 12th day of Jan., 1949.

/s/ VIRGINIA TURNER,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of \$11,023.31 Dollars.

/s/ EVERETT VAN EVERY,
Foreman.

[Endorsed]: Filed January 6, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28769

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, De-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation, et
al.,

Defendants.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on January 4, 1950, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Richard Boyd, Esq., and Augustus Castro, Esq., appearing as attorneys for the plaintiff, and Edward Heavey, Esq., and Leighton Bledsoe, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 4th, 5th, and 6th days of January in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having

subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of \$11,023.31. Everett Van Every," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Eleven Thousand Twenty-three and 31/100 Dollars (\$11,-023.31), together with her costs herein expended taxed at \$.....

Dated: January 9, 1950.

/s/ C. W. CALBREATH,
Clerk.

[Endorsed]: Filed and entered January 9, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT AND
OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named, and to Augustus Castro, Cooley, Crowley & Gaither and Boyd, Taylor & Reynolds, Her Attorneys:

You, and each of you, will please take notice that on Monday, the 16th day of January, 1950, at the hour of 10:00 o'clock a.m., or as soon thereafter

as counsel can be heard, or at any other time thereafter fixed by the Court, the defendant State Farm Mutual Automobile Insurance Company, by its attorneys, will move the above-entitled Court, the division thereof presided over by Honorable Herbert W. Erskine, at the courtroom of said court and division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

(1) For an order under and pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon heretofore entered in the above-entitled action in favor of plaintiff and against defendant State Farm Mutual Automobile Insurance Company, and directing that said judgment be vacated and directing that judgment be entered in accordance with the motion of defendant State Farm Mutual Automobile Insurance Company for a directed verdict heretofore made. Attached hereto and marked Exhibit A and incorporated herein is the draft of the proposed order requested by this defendant.

(2) Said motion will be made upon this notice and upon all of the records, papers and files in the above-entitled action, including the transcript of the testimony, all exhibits, and the proceedings had upon the trial of the above-entitled cause.

(3) Said motion will be made on the ground that at the close of all the evidence the defendant

State Farm Mutual Automobile Insurance Company made a motion for a directed verdict, which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for a directed verdict, and will be made upon the following grounds, and each of them:

(a) There was no evidence that the insurance policy sued on covered the judgment debtor, Duane Claggett.

(b) There was no evidence that Wilbur Mehlin, the named insured on the insurance policy, ever gave permission, express or implied, to Duane Claggett to use the automobile at the time and place of the accident involved in this case.

(c) The evidence established as matter of law that Duane Claggett, the judgment debtor, was using and driving the involved automobile at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

(d) The evidence showed as a matter of law that the declaration of principal place of use and garaging of the vehicle described in the insurance contract was violated and that such violation constituted a material breach of policy and avoided coverage at the time of the accident.

(e) That there were no acts or omissions or conduct by defendant, or by any of its agents, amounting to an estoppel as claimed by the complaint.

(f) There was no evidence of change of position

in any material respect, or at all, on the part of any plaintiff, or of plaintiff's representatives, or of the insured, in reliance on anything done by defendant, or not done by defendant, or its agents.

(g) That there is no evidence of any prejudice to any plaintiff, or to any insured, as the result of any act or conduct or failure to act on the part of defendant or its agents.

(h) There is no evidence of knowledge, actual or constructive, on the part of defendant or its agents which would be sufficient as a foundation for claiming a waiver or estoppel against defendant.

(i) There is no evidence to support a claim of waiver that is alleged in the complaint.

(j) There has been no proof of any estoppel against defendant as claimed by the complaint.

(k) No authority has been shown by the evidence in any agent of the defendant who dealt with plaintiffs or the insured, or with plaintiff's representatives, to waive any defenses under the insurance contract, or to estop the company.

(l) That no authority has been shown in any agent of the defendant to bind the insurance company on any of the matters claimed by plaintiffs to be the basis of a waiver or of an estoppel as claimed in the complaint, or as a waiver of any of the provisions of the insurance contract.

(m) That any waivers of nonwaiver provisions of the insurance contract or any estoppels that would amount to a change of terms of the insurance contract are prevented under the parol evidence rule, and no evidence has been presented to support

any waiver or estoppel with reference to the terms of the insurance contract.

(n) There was no evidence of any written endorsements on the insurance policy waiving any defenses or estopping the defendant from claiming any defenses under the policy.

(o) There was no evidence of any waiver or estoppel with reference to the declaration concerning the principal place of use and garaging of the vehicle, nor as to the violation thereof.

(p) That no extension of coverage could be established by waiver or estoppel.

(q) That no permission to use the vehicle granted by the named insured on the policy could be created or established by any waiver or estoppel.

(r) That the rights of the judgment creditor under the insurance contract became fixed and established at the time of the happening of the accident, at which time no rights existed in favor of the judgment creditors as against defendant under the insurance contract and no coverage existed at said time in favor of Duane Claggett, the judgment debtor.

(s) That there is no evidence that the defendant would have offered the sum of \$7,500, or any other sum to the plaintiffs had defendant known all of the material facts with reference to the removal of the described vehicle from the State of Nebraska.

II.

(1) Defendant State Farm Mutual Automobile Insurance Company further and in alternative will

move the above-entitled Court at the time and place hereinabove specified for an order under and pursuant to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting to defendant State Farm Mutual Automobile Insurance Company a new trial. Attached hereto and marked Exhibit B and incorporated herein is a draft of the proposed order for new trial.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial and the exhibits introduced in evidence, including the charge and instructions of the Court and the rulings of the Court on the instructions proposed by defendant State Farm Mutual Automobile Insurance Company.

(3) Said motion will be made upon the following grounds, and each of them:

(a) That the verdict is against the law.

(b) That the verdict is against the weight of evidence.

(c) That the verdict is contrary to the evidence.

(d) That the evidence is insufficient to sustain the verdict.

(e) Errors of law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions requested by plaintiff and in the giving of general instructions by the Court, which were objected and excepted to and in the

denial of defendant State Farm Mutual Automobile Insurance Company's proposed instructions to which denial said defendant duly objected and excepted, and rulings upon the admission of evidence.

/s/ EDWIN A. HEAFEY,

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,

Attorneys for Defendant State Farm Mutual Automobile Insurance Company.

EXHIBIT A

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insurance Company, a corporation, having duly moved the above-entitled Court to vacate and set aside the

judgment herein heretofore rendered in favor of plaintiff and against said defendant and having moved the Court to render and enter judgment in accordance with its motion for a directed verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said motion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against the plaintiff and in favor of defendant State Farm Mutual Automobile Insurance Company a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant State Farm Mutual Automobile Insurance Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

EXHIBIT A-1

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insurance Company, a corporation, having duly moved the above-entitled Court to vacate and set aside the judgment herein heretofore rendered in favor of plaintiff and against said defendant and having moved the Court to render and enter judgment in accordance with its motion for a directed verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said motion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby va-

cated and set aside, and judgment against the plaintiff and in favor of defendant State Farm Mutual Automobile Insurance Company, a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and in the alternative it is

Ordered, Adjudged and Decreed that the verdict and judgment herein in favor of plaintiff and against defendant State Farm Mutual Automobile Insurance Company, a corporation, be and they are hereby vacated and set aside and a new trial of this action is hereby granted to defendant State Farm Mutual Automobile Insurance Company, a corporation, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant State Farm Mutual Automobile Insurance Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

EXHIBIT B

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insur-
ance Company, a corporation, having duly moved
the above-entitled Court to vacate and set aside
the verdict and judgment herein and grant to said
defendant State Farm Mutual Automobile Insur-
ance Company, a corporation, a new trial, and the
matter having been heard and submitted to the
Court, and all of the parties having appeared upon
the making and hearing of said motion, and the
Court having considered the same and being fully
advised, it is hereby

Ordered, Adjudged and Decreed that the verdict
and judgment herein in favor of plaintiff and

against defendant State Farm Mutual Automobile Insurance Company, a corporation, be and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant State Farm Mutual Automobile Insurance Company, a corporation.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

Receipt of Copy Acknowledged.

[Endorsed]: Filed January 9, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 21st day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

ORDER DENYING DEFENDANTS' MOTION
FOR JUDGMENT NOTWITHSTANDING
THE VERDICT AND DENYING MOTION
FOR NEW TRIAL

Defendant's motion for judgment notwithstanding the verdict heretofore having been tried and submitted to the Court, now, due consideration having been had, it is Ordered that said motion be denied, and that the motion for new trial be and the same is hereby denied.

In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, and THIRD DOE,

Defendants.

Erskine, District Judge.

MEMORANDUM OPINION

Defendant has moved for judgment notwithstanding the verdict. On the instructions given to the jury, the verdict for the plaintiff can be upheld only on two possible grounds: (1) that there was permissive use, and therefore the action is within the coverage of the policy; or (2) that the defendant is estopped to deny coverage or assert the non-waiver provision of the policy, and that the jury so found such an estoppel present under the facts of the case.

It is my opinion, as I stated when the above-mentioned motion and the motion for a directed verdict were argued, that the evidence failed to

support a finding that the insured named in the policy expressly or impliedly permitted the use of the automobile covered by the policy by the person driving it at the time of the accident. Therefore the only question to be resolved by me is whether or not under the applicable law the plaintiff may raise such an estoppel against the defendant, and whether there is evidence to support a finding of such estoppel by the jury.

Although there is considerable disagreement possible as to whether the law of Nebraska or California should govern such an issue, the parties have not shown that the choice of law would produce a variance in result. No California cases squarely in point have been brought to the attention of the Court. However, the majority of courts that have passed upon this question hold that the insurer, by conduct such as defendant exhibited in this case, renders itself liable to the injured person if it has not seasonably preserved its rights by notice to the injured person that it contends that the claim for injuries does not come within the coverage of the policy, and that it undertakes to defend the insured against such claim without thereby relinquishing its objection on the ground of non-coverage. (See 130 ALR 184, and cases cited therein.) The only Nebraska case in point, *Wigington v. Ocean Acc. Corp.*, 120 Neb. 162, 231 N. W. 770, does not support the contention of the defendant; that case merely held that the facts as presented did not constitute a case of estoppel. This Court cannot hold as a matter of law that the facts in

the instant case will not support a finding of estoppel. Therefore this Court is constrained to deny the motions for judgment notwithstanding the verdict and for a new trial.

Dated: March 20th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice is hereby given that defendant The State Farm Mutual Automobile Insurance Company (a corporation) hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered of record in the office of the clerk of the above entitled court on the 9th day of January, 1950, in favor of the plaintiff and against said defendant.

Said appeal is taken from the whole of said judgment.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant The State Farm Mutual
Automobile Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS, AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Notice is hereby given that the defendant and appellant The State Farm Mutual Automobile Insurance Company (a corporation) does hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this cause:

1. Complaint.

2. Answer.

3. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.

4. The verdict of the Jury and Judgment entered thereon.

5. Motion of Defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

6. Minute order denying motion of defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwith-

standing the Verdict and in the Alternative for a New Trial.

7. Memorandum Opinion of the trial court filed March 21, 1950.

8. Instructions given by the Court.

9. Instructions proposed by defendant The State Farm Mutual Automobile Insurance Company (a corporation) and refused by the Court.

10. Reporter's Transcript.

11. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

12. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All other records required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant The State Farm Mutual
Automobile Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

NOTICE OF DENIAL OF MOTION FOR JUDG-
MENT NOTWITHSTANDING THE VER-
DICT AND IN THE ALTERNATIVE FOR
NEW TRIAL

To the Defendant, The State Farm Mutual Auto-
mobile Insurance Company, a corporation, and
to Edwin A. Heafey, and Dana, Bledsoe &
Smith, its attorneys:

You and Each of You Will Please Take Notice
that the above entitled court has denied defendant
The State Farm Automobile Insurance Company's,
a corporation, motion for judgment notwithstanding
the verdict and in the alternative for new trial.

Dated: March 24, 1950.

COOLEY, CROWLEY &
GAITHER,

By /s/ AUGUSTUS CASTRO,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28769

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

Before: Hon. Herbert W. Erskine,
Judge.

REPORTER'S TRANSCRIPT

January 4, 5 and 6, 1950

Appearances:

For the Plaintiff:

COOLEY, CROWLEY & GAITHER, by
RICHARD A. BOYD, ESQ., and
AUGUSTUS CASTRO, ESQ.

For the Defendants:

DANA, BLEDSOE & SMITH, by
EDWIN A. HEAFEY, ESQ., and
LEIGHTON M. BLEDSOE, ESQ.

(A jury was duly impaneled and sworn and the following proceedings were had.)

January 4, 1950, 10:00 a.m.

(Opening statement by Mr. Boyd on behalf of plaintiff.)

(Opening statement by Mr. Heafey on behalf of defendants.)

Mr. Boyd: At this time, your Honor please, I would like to offer into evidence a photostatic copy of the insurance policy. A copy has been attached to the original answer and served on us. Like to offer, if the Court please, as plaintiff's exhibit 1, being the certified copy of the insurance policy covering this automobile.

The Court: No objection to that, is there?

Mr. Heafey: No, your Honor.

The Clerk: Plaintiff's exhibit 1 in evidence.

(Whereupon certified copy of insurance policy was received in evidence and marked plaintiff's exhibit 1.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A attached to the Complaint. See pages 30 to 53 of this printed record.]

[Endorsed]: Filed Jan. 4, 1949.

Mr. Boyd: Now at this time, if your Honor please, there are certain pertinent parts of this

policy that I would like to read to the jury.

This policy, ladies and gentlemen, was issued on August 22 of 1947 and ran for a period of six months up to February 22 of 1948, for a premium of \$32.70, issued to the name of the insured, Wilbur Mehlin, 210 North 29th Street, Lincoln, Nebraska. Included in the policy under coverage A is the provision, "Defense, settlement, supplementary payments: As respects such insurance as is afforded by the other terms of [2*] "this policy (a) under coverage A (1) the company shall

1. Defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;"

The policy also covers, in addition to the named insured, Wilbur Mehlin, under supplementary agreements:

"2. Definition of 'insured': The unqualified word 'insured' wherever used in coverage A and in other parts of this policy when applicable to coverage A includes the names insured and, except where specifically stated to the contrary also includes

"(a) The spouse of the named insured residing in the same household as the named insured."

“(b) Any other person, but only while using the described automobile and any person or organization legally responsible for the use thereof, provided the actual use of the described automobile is with the permission of the named insured.”

This policy also provides under condition 1: [3]

“Policy. Territory, purposes of use. This policy applies only to accidents which occur and to direct accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, [3-a] its territories, possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.”

Declaration 3 as to the purposes of use is as follows:

“The automobile is to be used for pleasure and business which is defined as personal pleasure, family and business use, including loading and unloading and including transportation of friends, neighbors, fellow employees to and from work and school children to and from school on a share expense, accommodation or exchange hauling basis but does not include use in the business of transporting passengers for hire as a public or livery conveyance.”

The limits of liability under this policy are provided under coverage A:

“The Company’s limit of liability under coverage A:

“1. (Liability) for all damages including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident shall not exceed \$10,000;”

Now, if your Honor please, at this time there are certain [4] admissions that have been made to the pleadings that I would like to read into evidence to simplify the proof that is required of the plaintiff, if I may.

The Court: All right, proceed.

Mr. Boyd: Counsel, in the original complaint in the first cause of action, paragraph 1a is admitted. That is, it is admitted by the answer filed by the defendants, ladies and gentlemen.

“The defendant, the State Farm Mutual Automobile Insurance Company (hereinafter referred to as ‘Company’), was and now is a corporation duly organized and existing according to the laws of the State of Illinois and authorized to conduct and were and still are conducting an automobile insurance business in the city of Berkeley, County of Alameda, State of California;

“(d) That the amount in controversy herein, inclusive of costs and interests, exceeds the sum of \$3000;

“(e) That on the 12th day of July, 1948, the

Superior Court of the State of California in and for the County of Contra Costa duly made and entered its order appointing Bertha Lee Porter special administratrix of the estate of Charles E. Porter, deceased.”

Paragraph 4; counsel, on page 3, lines 12 down to the first three words of line 18: [5]

“That thereafter on or about the 19th day of December, 1947, plaintiff instituted an action against said Claggett to recover damages for the death of said Charles E. Porter and thereafter on the 29th day of September, 1948, judgment was rendered in said action in favor of the plaintiff and against said Claggett for the sum of \$30,000 and costs of suit, which were taxed at the sum of \$121.74 . . .”

Paragraph 5 counsel, following:

“That said ‘Mehlin’ have performed all the terms and conditions upon their part to be performed under said standard service automobile policy.”

Now, in the answer, counsel, page 7, lines 14 to 18. This is the answer, ladies and gentlemen, of the defendant, the State Farm Mutual Insurance Company.

“Answering the following allegations of paragraph 3 of the second alleged cause of action of said complaint:

“ ‘On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said “Company” prepared an Answer to such complaint

on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Ford with the permission of "Mehlin" and Paul C. Dana, of the firm of Dana, Bledsoe and Smith, verified such answer on behalf of said Claggett;' [6]

"Defendant admits said allegations;"

Mr. Heafey: I think, your Honor, that the rest of that allegation and the answer should be read because it is in connection with this and explains the admission, just reading an extract from the answer without reading the entire denial or admission.

The Court: I would suggest that you read the entire denial.

Mr. Boyd: Read the entire——?

The Court: That particular denial.

Mr. Boyd: Then he goes on:

"and, in this connection,"
following that?

Mr. Heafey: Yes.

Mr. Boyd: "and, in this connection, alleges that at the time said answer was prepared and filed neither defendant nor its attorneys, had any information or knowledge concerning the circumstances of the removal of the said Ford automobile from the State of Nebraska to the State of California,"

That sufficient?

Mr. Heafey: No.

Mr. Boyd: I think that is a matter of defense, if your Honor please.

The Court: Yes, I think that is enough. [7]

Mr. Boyd: Then, on page 6, counsel, of the complaint, lines 1 to 4. This is an allegation that was also admitted by the company, ladies and gentlemen.

“but thereafter said defendant ‘Company’ employed the law firm of Dana, Bledsoe & Smith to defend said Claggett pursuant to the terms of said policy.”

And then on page 7, counsel, lines 14 to 16; also admitted by the defendant insurance company:

“and said defendant ‘Company’ has paid said Dana, Bledsoe & Smith in full for their services as attorneys for said Claggett under said policy;”

At this time, if your Honor please, I would like to call Mr. Castro to the stand.

AUGUSTUS CASTRO

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Augustus Castro.

Direct Examination

By Mr. Boyd:

Q. What is your business or profession, sir?

A. I am an attorney at law, have been since 1936, admitted to all the courts in the State of California, including this Federal Court.

Q. And with whom, with what firm were you

(Testimony of Augustus Castro.)

associated in October of 1947, and at the present time? [8]

A. With the law firm of Cooley, Crowley & Gaither.

Q. Are you acquainted with the plaintiff in *his* action, Bertha Lee Porter? A. I am.

Q. And when did you first have contact with her, Mr. Castro?

A. First met Mrs. Porter about the early part of November of 1947 when she came to our office concerning the death of her husband.

Q. And following that contact, were any agreements reached, or did you represent her in this action? A. Yes, we did.

Q. And following your employment as attorney for Mrs. Porter, what was the first thing that you did in her behalf?

A. On November 10, 1947, we wrote a letter to the State Farm Mutual Automobile Insurance Company at 2054 University Avenue, Berkeley, California, concerning the death of her husband on October 31, 1947.

Q. Will you just read that letter, please?

A. This is a copy——

Mr. Heafey: Your Honor please, I would like to have counsel advise what is the purpose of his testimony.

Mr. Boyd: Based on the second cause of action, your Honor please, waiver and estoppel.

Mr. Heafey: Waiver and estoppel?

Mr. Boyd: Defense they may have. [9]

(Testimony of Augustus Castro.)

The Court: Yes, I thought it was intended to prove, attempt to prove those allegations for estoppel.

The Witness: That may be the original, Mr. Boyd. All I have is an office copy of that letter.

Mr. Boyd: I don't think there would be any question of reading it.

The Witness: Dated November 10, 1947, addressed to the State Farm.

"In re: Charles Lee Porter, deceased. Accident October 31, 1947.

"Dear Mr. Myers:

"We write to advise you that this office represents Mrs. Bertha Lee Porter, widow, and the two babies of Charles Lee Porter, who died November 1, 1947, from injuries sustained on October 31, 1947, in Richmond, when he was run down by D. R. Claggett, the driver of the automobile insured by your company.

"Without the delay and expense of litigation, this may be a case for amicable adjustment, subject of course to the approval of Mrs. Porter, and the Court's approval on behalf of the two infants.

"At your early convenience, we will be happy to discuss the matter, either with you personally or with any of your assistants.

"With best personal regards and thanking you for [10] your usual kind attention hereto,

"Very truly yours,

"COOLEY, CROWLEY &
GAITHER."

(Testimony of Augustus Castro.)

I believe the original was signed by Mr. Louis V. Crowley.

Q. Did you receive a reply to that letter?

A. Yes, we did.

Q. Would you read the reply, please, and the date?

A. November 14, 1947, on the letterhead of the State Farm Insurance Company, the following was written:

“November 14, 1947, to Cooley, Crowley & Gaither, 333 Montgomery Street, San Francisco 4, California. Attention: Louis V. Crowley.

“Gentlemen: In re: Charles Lee Porter, deceased. Accident October 31, 1947. Miscellaneous File 347.

“We have yours of November 10, advising of a claim being made against a party by the name of D. R. Clagget whose automobile, on October 31 of this year collided with Charles Lee Porter resulting in his death.

“A careful check has been made of our records, but we are unable to find a policy issued to Mr. Claggett. However, if you have any other information kindly advise us accordingly so that we may again review our records.

“Yours very truly,

“G. E. MYERS,

“Claims Manager.” [11]

Q. Subsequent to that date did you have any

(Testimony of Augustus Castro.)

conversations with any representatives or adjustors of the State Farm Mutual Automobile Insurance Company? A. Yes.

Q. What was the date of the first conversation that you had with them?

A. The first conversation occurred about December 3, 1947, with a man by the name of John Dennis.

Q. Where did that conversation take place?

A. That was a telephone conversation in reply to a call from Mr. Dennis.

Q. And what was that conversation?

A. In that conversation Mr. Dennis stated that there was insurance on the automobile which had caused the death of Mr. Porter and that they had been in error in previously reporting to us that there was no insurance covering the automobile.

Q. Did you have any subsequent conversations with any representative of the State Farm Mutual Insurance Company? A. Yes, I did.

Q. What was the next conversation?

A. On December 31, 1947, a man by the name of Louie Gripenstraw gave me a card, claim adjustor, State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, phone Thornwall 3-2100, 2054 University Avenue, Berkeley 4, California.

Q. What was the conversation with Mr. Gripenstraw? [12]

A. Mr. Gripenstraw called to our office and told

(Testimony of Augustus Castro.)

me that he was representing the State Farm and handed me his card. He told me that they had an insurance policy covering this automobile and that they were interested in seeing if the case could be settled. I told him we were likewise interested in settlement of the case. But before I would give him any figure I wanted to know what they would pay or what their policy limits were. He stated that he wasn't permitted under the rules of the company to give me the policy limits. I told him that we had information that indicated the policy limit was \$10,000. He said he would tell me that the policy limits did not exceed that. And then I asked whether the policy limits were only \$5,000. He said no, more than five. So I said that leaves the conclusion that you have a policy covering this in the sum of \$10,000. He says, "All I can say: it is no more or no less than that."

So then I said it looks to me like a case where you should pay the policy limits. As far as I can see there is no question but what the man was liable for striking Mr. Porter and we would like to see you pay the policy limits here and if you save anything on the policy limits you will be doing well.

He says, "Well, the company won't do that." I said, "Why not?" He said, "We may have a defense to the case." "Well, what is the defense? The only issues that are involved in the case are negligence and permission to use the automobile." I said, "We know the negligence is clear; any

(Testimony of Augustus Castro.)

question about the permission?" He said, "No, there isn't." He says, "We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it."

And then he submitted me a figure of \$7,500 on the \$10,000 policy and I told him I would advise Mrs. Porter, who was at that time living in Huntington Park, California, of the offer and on January 5, 1948, I wrote to her concerning the offer.

Q. Was there any subsequent conversations with any representatives of the State Farm Mutual?

A. After this meeting with Mr. Gripenstraw I had another telephone conversation with him in which I told him Mrs. Porter would not accept the sum of \$7,500 but would again ask for the policy limits. And he said they had no authority to pay the policy limits in California, but would have to contact their office back at Bloomington, as the policy was issued there and then a board would pass on it as to what they would pay.

He later called me and said—telephoned again and said they would not increase the offer over \$7,500. Then we filed suit against Mr. and Mrs. Mehlin and against Mr. Claggett and had the summons and complaints served on Mr. Claggett. Mrs. Mehlin at that time had returned to Lincoln, Nebraska, and Mr. Mehlin was likewise, as far as we knew, in Lincoln, Nebraska. [14]

After the service of the summons on Mr. Mehlin,

(Testimony of Augustus Castro.)

we were again contacted by the State Farm people.

Mr. Heafey: Did I understand you to say that he served a summons on Mr. Mehlin?

The Witness: Mr. Claggett.

The Court: You said "Mehlin."

The Witness: I am sorry, your Honor. May I correct the record? The date of my second conversation, of my two conversations with Mr. Gripenstraw following his visit at my office, were on January 13, 1948, and January 22, 1948. Then on January 28, 1948, I was contacted by a Mr. Hunt, who stated that he was—by telephone—who stated that he was representing the State Farm Mutual Automobile Insurance Company and that they were again interested in, before turning over the summons and complaint, to have a settlement made, and they wanted to save the expense of turning it over to attorneys to defend.

I again told him that we had asked for the policy limits and that they had offered \$7,500, that \$7,500 was not acceptable. He said that as far as he was concerned in a case of this kind that they paid up to the sum of \$8,500 where they had a policy limit of \$10,000. In an exceptional case they would pay \$9,000, but his authority at that time was limited to \$7,500 and would I submit a proposal in the neighborhood of \$9,000 to \$8,500, and I told him I would contact Mrs. Porter by letter, and our conversations concluded there. [15]

And I contacted Mrs. Porter by letter and after

(Testimony of Augustus Castro.)

talking to—receiving a reply from her, I again talked to Mr. Hunt. Mr. Hunt had called our office on or about the 5th day of February, 1948, and left his number as Thornwall 3-2100, and in response to that telephone message I called Mr. Hunt and Mr.—I had told Mr. Hunt that Mrs. Porter would accept the sum of \$9,750. He rejected that offer stating again that they would not go over the sum of \$8,500, unless an exceptional case, and in that event only go to \$9,000, but he still would not offer \$8,500 or \$9,000 and I said, look, then, they better turn it over to their attorneys, because we would have the matter tried.

Q. Did you have any subsequent conversations with any representatives of the State Farm Mutual Automobile Insurance Company concerning the representation of Mr. Claggett?

A. I believe that within a day or two after that conversation on February 5, 1948, Mr. Hunt called me and stated their attorneys were Dana, Bledsoe & Smith, and that he was going to turn the file over to them and would I grant him an extension of time in which to appear for Mr. Claggett, and I said that I would and I believe there was a formal stipulation signed protecting their time within which to appear in the action.

The Court: It is now 12 o'clock, gentlemen. We will now adjourn until 2 o'clock this afternoon. And during the adjournment, ladies and gentlemen, bear in mind the admonition I have [16] heretofore given you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [16-a]

January 4, 1950, 2:00 P.M.

AUGUSTUS CASTRO

resumed the stand.

Direction Examination
(Continued)

By Mr. Boyd:

Mr. Boyd: May I proceed, Your Honor? Mr. Castro.

Q. Mr. Castro, following the granting of the extension of time in which to plead, did you have any communications or conversations with the firm of Dana, Bledsoe & Smith, the attorneys for the State Farm?

A. They filed a formal answer in the action, which was the only communication I had until some time after that answer had been filed.

Q. Was anything said in that answer as to the use of the automobile?

A. Yes, there was. Reading from a copy of their answer, which was served on us in our office, page 2, paragraph 3, line 8, they answered as follows. This was the answer which was sworn to by Mr. Dana, acting as attorney for Mr. Claggett, and he swore to it on the grounds that Mr. Claggett was absent from the county and he stated that the same is true of his knowledge, except those matters he states on information and belief.

(Testimony of Augustus Castro.)

In paragraph 3 of the answer he alleges, "Answering the allegations of paragraph 3, defendant admits that South 47th Street and Access Highway were and are the intersecting public streets, in the City of Richmond, County of Contra Costa, [17] State of California, that the defendant, Wilbur M. Mehlin, was the owner of the therein described Ford automobile and that this answering defendant was driving said automobile with his consent and permission and with these exceptions, defendant denies each and every and all and generally and especially, the allegations of paragraph 3 of the complaint;" and in paragraph 3 of the complaint we had alleged that plaintiffs are informed and believe and upon such information and belief allege that said defendant, Wilbur M. Mehlin and certain other people were the owners and entitled to the possession of the Ford automobile hereinafter mentioned, and that he was, said defendant, Duane R. Claggett, was driving and operating said automobile with permission of said defendants and Mr. Dana's answer to that paragraph admitted the permission.

Mr. Heafey: May we have the date of that answer, please?

The Witness: That answer is verified February 17, 1948.

Q. (By Mr. Boyd): Now, Mr. Castro, following the receipt of the answer that you have just referred to, what, if anything, was done with this lawsuit?

(Testimony of Augustus Castro.)

A. There was no investigation made after the filing of that answer concerning the permissive use since the company representative, Mr. Gripinstraw, had informed me that there was proper permission and Mr. Dana stated in his answer under oath that there was permission. We relied on representation of Mr. Gripinstraw, and a sworn statement of Mr. Dana concerning [18] permissive use and made no investigation concerning it.

Q. Was either Mr. Mehlin or his wife ever served with a copy of this summons and complaint?

A. No, neither one was served; as long as Claggett had permission to use the vehicle, there would be nothing gained to bring in either Mr. or Mrs. Mehlin.

Q. Now, Mr. Castro, did you have any further conversations with any of the representatives of Dana, Bledsoe & Smith, following the filing of the answer that you have referred to?

A. Yes, we filed a memorandum to set the case for trial on February 25, 1948, and that was served on Mr. Dana's office and after it was served, Mr. Dana, one of the members of his office—I have forgotten who it was, I believe it was his secretary—called me and said Mr. Dana would like to stipulate as to a trial date and that they thought the 6th of July, 1948, would be satisfactory, and it was learned that the 6th was a regular law and motion day because of the 4th of July holiday, so a formal stipulation was prepared by Dana, Bledsoe & Smith

(Testimony of Augustus Castro.)

in writing, setting the case for trial on the 12th day —on the 7th day of July, 1948, and that stipulation was dated March 12, 1948.

Q. And who did Dana, Bledsoe & Smith appear for on that stipulation setting the case for trial?

A. Duane R. Claggett.

Q. Now, did you have any conversations with any members of the [19] firm following the stipulation for the day certain for trial?

A. Yes, on two occasions between March 9 and the date of the trial, I would place the occasions about a week or ten days before July 7, 1948, Mr. Dana called me on the telephone concerning the case and he stated first that he wanted a continuance as he didn't think he would be able to try it and second, that he thought it was a case which he should settle and if we would consent to the continuance he thought he could work out a settlement with the company, and that was about a week to ten days before the trial of July 7, and I believe three or four days before that trial he again called and requested a continuance and I refused the continuance and he again made the statement concerning the settlement of the case if he could get a continuance.

Then, the Friday or Saturday before the trial, which was about the 2nd or 1st or 2nd of July, Mr. Bledsoe called and stated he was going to take over the file and handle the trial as Mr. Dana couldn't try it and then on the morning, or some

(Testimony of Augustus Castro.)

time during the day of July 6, the day before the case was set for trial, Mr. Bledsoe advised me he was going to have to move for a continuance on the grounds he would not be able to bring Mr. Claggett out from Minnesota, or one of the mid-western states, for the trial on July 7.

And on the morning of July 7 we appeared at Martinez and Mr. Bledsoe was there and Mrs. Porter was there and Mr. Bledsoe [20] at that time filed a formal motion for a continuance and the court granted the continuance upon the condition that the defendant, and upon the stipulation by Mr. Bledsoe, that they would pay the expenses of the transportation of Mrs. Porter from her home at Huntington Park to Martinez, the court expenses such as the bringing in of the jury that morning, the mileage, and two or three witnesses, I believe, which we had subpoenaed for trial to be there that morning, and Mr. Bledsoe stated to his Honor, I believe it was Judge Patterson, that he would see that those costs were paid on behalf of the defendant Claggett, and the continuance was granted to the 14th of July, 1948.

After we had left the Judge's chambers, Mr. Bledsoe stated to me that he had reviewed the file and there couldn't be any settlement of it because he had found out there was a question of permissive use involved and the company had not secured any reservation of rights up to that time and he didn't know what he could do about it because it looked

(Testimony of Augustus Castro.)

too late for him to obtain a reservation of rights, but going to get one when Mr. Claggett appeared for the trial on the 14th of July.

And that is the last conversation that I had with him up to the time of trial on the 14th of July.

Q. Was any formal answer filed subsequent to February 17 of 1948?

A. Yes, on the morning of July 17. Mr. Bledsoe——

Q. July 17?

A. I mean July 7. Mr. Bledsoe also made a motion to file an [21] amended answer. And in that amended answer he eliminated the allegation of his earlier answer where he had admitted that Mr. Mehlin had consented to the use of the automobile by Claggett and merely admitted that the automobile was being driven with the permission of Mrs. Claggett and——

Q. Mrs.——

A. Mrs. Mehlin, and he did it on page 1 of his amendment to answer of Duane R. Claggett as follows. Reading from line 29:

“That the defendant Wilbur M. Mehlin was the owner of the therein-described Ford automobile and that this answering defendant was driving said automobile with the consent and permission of Mrs. Wilbur M. Mehlin and that these exceptions and

(Testimony of Augustus Castro.)

denies each and every and all and single, generally and specifically the allegations of paragraph 3."

Mr. Bledsoe swore to that answer on behalf of Mr. Claggett on July 6, 1948, before a notary public named Marie H. Stanley, in and for the City and County of San Francisco.

Q. Was the case tried on July 14?

A. The case was tried before Judge Patterson on July 14.

Q. Who represented Duane R. Claggett in the trial of the action filed by Bertha Lee Porter against the driver of the automobile, Duane R. Claggett?

A. Mr. Leighton Bledsoe.

Q. Of the firm of Dana, Bledsoe & Smith? [22]

A. Yes.

Q. Following the trial of that action were there any subsequent motions made?

A. There were formal findings and conclusions of law requested by the defendant Duane R. Claggett through Mr. Bledsoe and when we proposed certain findings he resisted them and proposed findings of fact and the court, I believe, set the matter down for hearing, and Mr. Bledsoe appeared on the hearing, and I appeared for Mrs. Porter and the court settled the findings of fact.

Q. Was there subsequent proceedings, settlement of findings of fact?

A. After the findings of fact and the formal judgment was signed in September, Mr. Bledsoe filed a notice of intention to move for a new trial on behalf of the defendant Claggett and thereafter

(Testimony of Augustus Castro.)

that motion was set down for hearing before Judge Patterson and Mr. Bledsoe appeared for Claggett, I appeared for Mrs. Porter, and the motion argued and denied.

Q. What was the date of the denial of the motion for a new trial?

A. I believe approximately October 5.

Q. Has there been any payment of any kind of the judgment of \$30,000 interest and costs that has been received by Mrs. Porter?

A. No payment in any amount. [23]

Q. Following the denial of the motion for new trial, did you receive any communications from the law firm of Dana, Bledsoe & Smith concerning the payment of the judgment?

A. Yes, we did. I believe towards the end of October, 1948, Mr. Bledsoe wrote a letter to our firm to my attention.

Q. Would you read that letter to the jury, please?

A. On the letterhead of Dana, Bledsoe, & Smith, law offices, 440 Montgomery Street, San Francisco, October 25, 1948.

“Cooley, Crowley & Gaither,

“333 Montgomery Street,

“San Francisco

“Attention: Mr. Castro

“Re: Porter vs. Claggett.

“Gentlemen:

“So that you may be advised of our position with

(Testimony of Augustus Castro.)

reference to the above-entitled case, we wish to state that we have notified Claggett that no further proceedings will be taken by us as attorneys for the State Farm Mutual Insurance Company in the above-entitled action. We have notified him as of today and on previous occasions, that the State Farm Insurance Company does not recognize any liability to him under its policy issued to Wilbur Mehlin. We have also told him that the insurance company will not pay any judgment on the above-entitled case, but will stand on its position that there was and is no coverage for Claggett on account of the accident involved. [24] We have notified Claggett that he can secure other counsel if he so desires for the purpose of taking an appeal. We doubt that he will do this because we gave him similar information and advice in August of this year and got no response from him.

“Very truly yours,

“DANA, BLEDSOE & SMITH,

“By LEIGHTON M. BLEDSOE.”

Q. Was any appeal taken from that judge?

A. Not to my knowledge.

Mr. Boyd: You may cross-examine.

Cross-Examination

By Mr. Heafey:

Q. Mr. Castro, you mentioned the fact that some time in July, I believe it was the early part of July or around July 7, that a motion was made for a continuance in this case? A. Yes.

(Testimony of Augustus Castro.)

Q. Was that on July 7?

A. I believe it was the morning of July 7.

Q. And at that time was a motion made for continuance of the trial date? A. Yes.

Q. And also a motion to file an amended answer?

A. Yes.

Q. Now, in support of that motion to file an amended answer, [25] was an affidavit filed?

A. Yes.

Q. And whose affidavit was that?

A. I believe it was Paul C. Dana.

Q. Have you a copy of that affidavit?

A. Yes.

Q. That was the affidavit containing the facts which supported the motion for leave to amend the answer, did it not?

A. It contained a statement by Mr. Dana which attempted to justify the amendment.

Q. Yes. Now, will you kindly read the affidavit to the jury, please, that was filed at that time?

Mr. Boyd: Your Honor please, that is objected to as a self-serving declaration by the representatives of the State Farm Mutual Insurance Company as to why they wanted to make any amendment to the—the fact that the amendment was made, I think, is the ultimate fact that is admissible.

The Court: It may have some bearing on this question of estoppel.

Mr. Heafey: Yes, your Honor.

The Court: I will allow it. It will come in, anyway.

(Testimony of Augustus Castro.)

Mr. Boyd: Very well, your Honor.

The Witness: I think we should have the right to cross-examine, your Honor. We are deprived of cross-examination if the affidavit is put into evidence. [26]

The Court: This is the affidavit in support of a motion to amend the answer?

Mr. Heafey: That is right.

Mr. Boyd: Yes, your Honor, made by an attorney who is not present in court and merely a self-serving declaration as to their reasons as to why they asked permission from the Court to amend the answer originally filed. The fact is that the answer was amended as set out in the plaintiff's testimony, but the idea is we are deprived of a right of cross-examination and the affidavit itself as set forth in the answer is entirely self-serving and I don't feel it should be read in the evidence as we know nothing about the contents thereof.

The Court: Mr. Dana is available?

Mr. Heafey: No, your Honor, Mr. Dana is out of town, ill; advised by his doctor to go away and stay away until the 1st of February. But they brought out the fact that this motion was made. The motion was granted, read the amended answer, the amended allegations in the answer, and I think we are entitled to show by the affidavit the basis for that.

The Court: I will allow it to be read. I feel the claim of estoppel here may be relevant.

(Testimony of Augustus Castro.)

Mr. Heafey: Very well, your Honor.

Q. If you haven't that, Mr. Castro, I will show you what purports to be a copy and maybe you can identify it.

A. I am pretty sure it is in the file. Let me check here. [27] Entitled: "State of California, City and County of San Francisco. Paul C. Dana, being duly sworn, deposes and says:

"That he is an attorney licensed to practice in the states of California"—

Mr. Heafey: "In the courts."

A. "In the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, attorneys for defendant Duane R. Claggett in the above-entitled action; that he is the attorney to whom this case was assigned for handling; that he prepared and verified the answer of Duane R. Claggett in February, 1948; that at said time the file on said action then in affiant's possession indicated that the automobile driven by said defendant at the time of the accident was owned by Wilbur Marvin Mehlin and that it was being driven by defendant Claggett with the consent of Mehlin's wife at the time of the accident; that the circumstances of how the wife had possession, or of how she was empowered to give permission for the use of said automobile were not then revealed in affiant's file; that affiant prepared the answer upon information contained in the file and for that reason admitted that the automobile was being driven with the consent of the defendant Wilbur M. Mehlin;

(Testimony of Augustus Castro.)

that affiant had not [28] consulted defendant Claggett before preparing and signing said answer; that affiant is informed and believes and upon such information and belief alleges that defendant Claggett can only say that he was driving the car with the permission of Mrs. Mehlin; that shortly after April 19, 1948, affiant received a letter from attorneys Ginsburg & Ginsburg of Lincoln, Nebraska, advising affiant that they were attorneys for defendant Wilbur Mehlin and setting forth the following information:"

Excuse me. If your Honor please, at this time the affidavit goes on to quote a letter from attorneys purportedly representing the Mehlin in Lincoln, Nebraska, as to certain information that they are assumed to have had that they communicated to Mr. Dana, who has made this affidavit and contains that letter. It seems to me——

Mr. Heafey: Which is the first information, your Honor, that anyone had concerning the case.

The Court: Statements made in the letter about facts are hearsay and shouldn't be binding on the plaintiff.

Mr. Heafey: No.

The Court: Maybe it should be stipulated that there was a letter of that character that came in at that time, disclosed the fact, if it were a fact, that——

Mr. Heafey: Mrs. Mehlin. [29]

The Court: ——Mrs. Mehlin was the only one

(Testimony of Augustus Castro.)

who authorized the use of the car. Can't you make a statement from that affidavit to the effect that it proceeds to state that he received a letter which gave him notice that they claimed the facts to be otherwise, and the answer, the original answer——

Mr. Heafey: Yes.

Mr. Boyd: We will stipulate to that, but the contents of the letter itself is what we object to.

Mr. Heafey: We will stipulate to that, too, your Honor.

The Witness: Would it be proper, your Honor, at this time to ask for a stipulation as to what investigation the State Farm had made up to the time the answer was filed concerning permissive use?

Mr. Heafey: That is a matter of cross-examination. We are putting on our case.

The Court: I think so; the presumption is——

The Witness: That is one of the problems which we would cross-examine Mr. Dana about. We are not going to have that opportunity.

The Court: Well, you have a sense of presumption that they made an investigation.

Mr. Heafey: And the rest of the affidavit is admissible, your Honor?

The Witness: Reading from lines 24:

“That affiant is informed and believes and upon such information and belief alleges the fact to be that no service of process has been made in this case upon defendant Wilbur M. Mehlin nor upon his wife;

(Testimony of Augustus Castro.)

“That following receipt of the foregoing letter affiant caused an investigation to be made into the legal aspects of the alleged permissive use of the automobile in question; that the law of Nebraska will be involved; that one of affiant’s associates has examined the law of California and reported thereon to affiant, but the law of Nebraska has not yet been ascertained by affiant; that it may become important to the other defendants named in this case and not yet served as to whether defendant Claggett had permission of defendant Wilbur M. Mehlin to use the automobile at the time and place of the accident; that affiant expects to be asked to represent the defendant Wilbur M. Mehlin in this action when or if said defendant is served with process therein;

“That affiant now believes that the admission made in the answer of defendant Claggett to the effect that said Claggett was driving the automobile with the consent and permission of defendant Wilbur M. Mehlin is untrue, incorrect, and in error; that defendant Claggett can only admit that he was driving said automobile with the permission and consent of [31] Mrs. Mehlin; that the ends of justice and the interests of truth require that said answer be amended for the purpose of changing the admission made by the defendant Claggett to the limited effect that said automobile involved in the accident was owned by Wilbur M. Mehlin and was being driven at the time of the accident in question

(Testimony of Augustus Castro.)

by defendant Duane R. Claggett with the consent and permission of Mrs. Wilbur M. Mehlin.

“Wherefore, affiant prays for leave to amend the answer of defendant Claggett as herein indicated.

“/s/ PAUL C. DANA.

“Subscribed and sworn to before me this 6th day of July, 1948.

“[Seal] MARIE H. STANLEY,

“Notary Public in and for the City and County of San Francisco, State of California.”

Q. Is that the 6th day or 2nd day?

A. 6th written *here*.

Mr. Heafey: That is all.

Mr. Boyd: No further questions.

(Witness excused.)

Mr. Boyd: At this time, your Honor please, I would like to read one additional paragraph of the insurance policy into evidence:

“Supplementary agreements—2. As respects such insurance as is afforded by the other terms of this policy the company shall pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, or premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid,

tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;''

If your Honor please, at this time the plaintiff rests.

Mr. Heafey: We have a motion we want to make at this time, your Honor. This motion is liable to take some time to argue. I am sure of that, so that maybe your Honor would want the jury to come back tomorrow morning.

The Court: Ladies and gentlemen, you will be excused for the remainder of the afternoon. You will return here again at 10 o'clock tomorrow morning and during the time that you are away, please bear in mind the admonition I have heretofore given you. You are to leave now.

(Jury excused.) [33]

The Court: Proceed.

Mr. Bledsoe: At this time the defendant moves for a judgment of dismissal on the following grounds: One, that there has been no evidence that the operator of the automobile, Claggett was operating it with the permission, either express or implied, of the named insured, Wilbur Mehlmi; that the evidence does not show any knowledge of the defendant or any of its authorized agents of any facts which would warrant a finding of a waiver or of an estoppel; that there is no evidence of any

waiver on the part of the insurance company or of any of its authorized agents with reference to the lack of coverage in the case; that there is no evidence that the plaintiff in this action, or plaintiffs in this action, have been prejudiced or their positions prejudiced with reference to any representations or statements or acts of the insurance company or of any of its agents; that there is no evidence of any estoppel against the insurance company; that there is no evidence of any authority on behalf of any of the persons speaking on behalf of the insurance company to waive any provisions of the policy or to bind the company with reference to their statements. And there is no evidence that the policy extends coverage to the person against whom the judgment was obtained, namely, Duane R. Claggett, and that as a matter of law the coverage of the insurance policy cannot be extended to make it cover something that it does not cover by any acts or conduct which would amount [34] to a waiver or an estoppel.

(Thereupon argument was made by Mr. Bledsoe on the motion for a judgment of dismissal.)

(Argument by Mr. Castro on behalf of the plaintiff.)

(Whereupon the Court made the following ruling:)

The Court: I am not familiar enough with these authorities that you have cited. I would like to

look those over during the interim between now and tomorrow morning and then advise you of my ruling on the second count, but I think I will have to deny the motion as to the first count at this time.

Suppose you gentlemen get here about ten minutes of ten so that I can just tell you what the ruling is without telling it in front of the jury.

Mr. Heafey: Yes, your Honor.

The Court: Recess until 10 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m., Thursday, January 5, 1950.) [35]

Thursday, January 5, 1950, 9:30 A.M.

The Clerk: Porter vs. State Farm Mutual Automobile Insurance Company and others, on trial.

The Court: Gentlemen, I have decided at the present time to deny the motion as to both counts of the complaint. I am somewhat in a quandary as to the second count.

Looking over that note, 81 ALR, seemed to me that disposition of the Court was to find a waiver or an estoppel in the event that the insurance company at the time of taking over the defense of the action didn't notify the insured, whoever they were defending, that they were doing it with the reservation. I prefer not to grant the motion at the present time, although I am not entirely satisfied in view of the provisions in the policy itself.

I would suggest we proceed with the trial of the case.

(Whereupon there followed further argument by counsel for the plaintiff and counsel for the defendants.)

Mr. Heafey: There is another matter, your Honor, certain depositions in this case taken under stipulation, and I think we are going to offer these depositions in evidence and I think counsel wants to object to certain parts of them.

Mr. Boyd: I don't know whether the original is available, but there are several objections we have to them. There are about five depositions.

The Court: Tell me about them.

Mr. Boyd: We start out, the first deposition is the deposition of a witness, G. Henry Crane, who is an employee of the First National Bank and who testifies that there was a mortgage placed on this automobile and that there was a mortgage placed prior to the time that the insurance policy was written. Now, in the first place, your Honor will recall that counsel has withdrawn his defense that the automobile was mortgaged and that fact was not disclosed to the insurance company upon receipt of the application that—following that the mortgage was shown, and in the second place, if we interpret the contract—if your Honor please, the mortgage applies only to condition B of the policy which has nothing to do at all with this action. Coverage A is the personal injury liability and the policy specifically provides that the mortgage only

applies to the property damage and collision portions of it. So we don't feel that the testimony of this witness in its entirety as to the fact that there was a mortgage, a chattel mortgage on this automobile, is material, and we think that we would like to make an objection that it is incompetent, irrelevant and immaterial in its entirety and it is also hearsay as far as the plaintiff is concerned and has no bearing and wouldn't tend to prove or disprove any issues in this case.

The Court: Isn't there another defense based on the mortgage to the effect that having mortgaged the property they had [37] no right to take it out of the State of Nebraska?

Mr. Heafey: That is our purpose, your Honor.

Mr. Boyd: It seems to me that the answer to that is simply this: there is no indication, there is no evidence in any part of this deposition that the wife mortgaged the automobile at all. All they prove in these depositions is that the husband placed a mortgage on the automobile and if we may go a little further on that same subject to the thoughts we have on the——

The Court: Isn't the best evidence the chattel mortgage itself?

Mr. Boyd: I would think so.

Mr. Castro: Also the criminal proceeding, which is referred to, dismissed for insufficiency of the evidence, and I don't see how a dismissal can be used in this case. If she had pled guilty to violating a law, it might be a different proposition.

Mr. Boyd: We go further and we have the depositions of a deputy county attorney, Herbert A. Ronin, who testifies——

Mr. Heafey: I don't think we will offer that in evidence. That merely shows that a complaint was sworn out and that she was arrested as a result of that complaint. We are not going to offer that in evidence, your Honor, but we do feel this testimony with reference to the fact that the car was mortgaged is admissible on the theory that he would not have [38] granted permission for her to take the car out of the state of Nebraska, knowing it was a crime to take it out, being mortgaged. May be a party to that crime.

Mr. Boyd: If that is withdrawn, may we go further so your Honor will have the entire picture? I know your Honor hasn't had the chance to see the depositions. In Mr. Ronin's deposition there are various telegrams that are introduced as exhibits showing that——

The Court: Who is Ronin?

Mr. Boyd: Deputy county attorney. Showing that the sheriff in Lincoln had wired the sheriff in San Jose and so forth to pick up the wife and bring her back. I take it those will not be offered?

Mr. Heafey: Those are all in the body of the deposition of Ronin.

Mr. Boyd: We can go further and we have the testimony of Leland M. Towle, who is the clerk of the Municipal Court and who testifies as to the issuance of the complaint against the wife, which

is also attached as a—alleging against Carol Doris Mehlin the crime of removal of mortgaged property from the state. And in the testimony itself it is shown, and by these exhibits, that that charge was dismissed for insufficiency of evidence.

So, insofar as the criminal proceeding in its entirety, whether it be the testimony of the deputy district attorney or [39] the clerk of the court or of the orders and the exhibits and the warrants, and so forth, we don't feel that it would be admissible under any circumstance because it was dismissed and it was only a charge.

Now, we feel that if any of this evidence is read to the jury they may think that there is something that was done, that was wrong, when as a matter of fact the entire matter was in effect dismissed by the deputy district attorney because of insufficiency of the evidence. And if we understand the rules under any theory, a charge, unless there is a conviction, cannot be held against the—certainly the plaintiff in this action, a stranger to the entire proceeding.

Mr. Heafey: We are not trying to prove a charge. Your Honor, we merely offer in evidence the deposition of the assured, Mr. Mehlin, and his wife, Mrs. Mehlin, and also of the banker, Mr. Crane. The testimony of the banker, Mr. Crane, is to the effect that there was a mortgage on this Ford automobile and the mortgage was in full force and effect on the 14th day of October, 1947, when the automobile was taken out of the state. That

is our sole purpose in showing that. With reference to the testimony of the county attorney and the clerk, we will not offer those in evidence. Mrs. Mehlin has testified——

The Court: You are not offering in evidence the complaint against Mrs. Mehlin and the dismissal at all? [40]

Mr. Heafey: No, your Honor, because in her deposition she mentions the fact that she was arrested in California for removing property and brought back. We want that in, of course, and that is sufficient to cover the matter.

Mr. Boyd: Now, if I understand correctly, counsel, we are down now to the deposition of Mr. Mehlin and Mrs. Mehlin, is that correct?

Mr. Heafey: That is right.

The Court: Only if he wants to offer the deposition of the bank to show about this mortgage.

Mr. Heafey: Yes, Crane.

Mr. Boyd: We feel that mortgage is entirely foreign to the issues in this case because first of all, if your Honor please, Mr. Mehlin himself doesn't testify that he forbade his wife to take the car out of the state and all of this mortgage business is——

The Court: Presumption, I suppose he has obeyed the law.

Mr. Boyd: But all this mortgage, as we see it, your Honor, the bank may have a right of action, of criminal action or something against anyone taking mortgaged property out of the state, but all this mortgage and all this testimony is related to

a husband. In other words, the bank is making no complaint. The husband wanted to find his wife for him, and apparently the only way he could find her was to have the sheriff look for her and the only way the sheriff could look for her was to have some [41] kind of charge made out, so put it on this mortgage proposition. We think the entire thing is entirely immaterial, prejudicial to our interests.

Mr. Heafey: There is an inference by reason of the fact she had, the wife, she had permission to take it out of the state. This certainly counteracts this inference. The fact that the car was mortgaged and should not have been taken out of the state without consent of the mortgagor.

Mr. Bledsoe: It also goes to the question that they claim the insurance company should have investigated further with reference to the car being used in California and I think the insurance company would be entitled to assume that the law was obeyed and nothing was wrong in view of the fact that the company knew that there was a mortgage with such restrictions on it.

Mr. Castro: May I point out, on the mortgage itself, that the vehicle can't be brought out of state without the permission of the mortgagor. My recollection of the deposition is that there is no testimony by the mortgagor any place that the permission to bring the vehicle out of the state was not given.

Mr. Heafey: States in the deposition: "Did

you on or before that time give permission to take the car to California?"

Mr. Boyd: That is in Mehlin?

Mr. Heafey: That is in the bank.

Mr. Castro: That is in the mortgage, and the mortgage [42] provision relates to the consent of the mortgagor and the permission of the mortgagor and I think that is entirely lacking in all of those depositions.

The Court: In other words, the law in Nebraska is to the effect that property which is subject to a chattel mortgage cannot be taken out of the state, probably a misdemeanor to take it out of the state unless you do so with the permission of the mortgagor.

Mr. Heafey: That is correct, your Honor.

The Court: No evidence here that the mortgagor hadn't given that permission.

Mr. Boyd: That is correct.

The Court: Well, it would seem that there wouldn't be foundation for it if there is no evidence permission hadn't been given by the mortgagor.

Mr. Castro: It seems to me that the burden of proof is on the plaintiff in that respect to establish permission and show that it was rightfully taken from the state. We don't have to show that it wasn't. The burden of proof, all the elements themselves under the policy, and the granting and permission to use the automobile is on the plaintiff.

The Court: Well, I haven't seen, of course, the law, the provisions of the law in Nebraska to which

you refer. I will allow the evidence of that banker in and then later on, perhaps, strike it out and instruct the jury that that law did not prevent [43] her from taking the automobile out of the state of Nebraska.

Mr. Boyd: I don't think there is any mention and we have carefully gone over the deposition and counsel has just looked through it, and the only evidence is that Mehlin, the husband, took a mortgage which the insurance company knew about as shown by their withdrawal of that defense.

Mr. Heafey: No question about that.

Mr. Boyd: I really feel that wouldn't be introduced had it not been for that additional defense, but it is in the depositions we feel there might be some inference the jury might draw from the fact that there was a mortgage, that she was guilty of a crime, or something of that kind. If there is any evidence, of course, introduced, why the dismissal of the complaint for insufficiency of the evidence is of course the answer.

Mr. Bledsoe: Mr. Boyd, if it wasn't dismissed for insufficiency of the evidence, I think the prosecuting attorney dismissed, said he didn't have enough evidence, wasn't any evidence which in—

Mr. Heafey: Through a reconciliation.

Mr. Boyd: January 9, 1948, dismissed by the county attorney for insufficient evidence, so that the—

Mr. Heafey: On the motion of the county attorney. That doesn't show any trial of the action.

Mr. Castro: Who usually makes the motion, counsel? [44]

The Court: Of course, that hasn't anything to do with the testimony of the banker that there was a chattel mortgage.

Mr. Boyd: No, it would not.

The Court: Not asking to put all that record in?

Mr. Boyd: As a matter of fact, if your Honor please, Mehlin himself in his testimony testifies that there was a chattel mortgage on the car at the time that it was, that the policy was issued.

The Court: Well, what difference would it make?

Mr. Boyd: The banker can confirm that.

Mr. Heafey: Any objection to the deposition of Mrs. Mehlin?

Mr. Boyd: Yes, I have one or two. In Mr. Mehlin's deposition on page 20, beginning on line 9, counsel, and continuing until page 22, line 10, we go over the fact that Mr. Mehlin himself went to see the county attorney about the swearing out of the warrant and all of that same evidence that counsel has already withdrawn and so far as the deputy district attorney and the exhibits and so forth.

Mr. Heafey: It goes farther than that, counsel. It might be well to read these questions and answers. You haven't got a copy of the deposition? This refers to whether or not he has given consent for taking the car. Starts at line 9 and goes down to the bottom.

Mr. Boyd: Next two pages, goes to the county attorney's [45] filing of the warrant and complaint and so forth.

Mr. Heafey: Our theory is that it certainly shows that he couldn't have acquiesced or taken the car out of the state.

The Court: I think it is admissible on that.

Mr. Boyd: I have one or two others. On page 27, counsel, lines 1 to 3, just one question here. This seems like a comparatively small matter, your Honor, but don't like to get all the dirt.

"Q. When did you first contact the firm of Ginsburg & Ginsburg?

"A. I applied for a divorce through Mr. Ginsburg."

We want to make an objection on that, that answer is not responsive to the question and not a technical objection, but we don't see all of this divorce and all of this crime, and so forth, should be brought in, might affect our clients' interests.

Mr. Heafey: In that connection you recall that there is a letter from Ginsburg to Dana's office stating that he was representing them in the divorce action and that was the first notice that Dana's office had on the matter, and we are going to offer that in evidence, and this merely confirms it.

The Court: The answer is not responsive. Asked when he first saw Ginsburg and then when "I applied for a divorce . . ." but it isn't a responsive answer.

Mr. Heafey: That isn't your Honor, but the

next question was: "When was this?" And the answer was: "About December of [46] '47."

The Court: You can read it so that it reads: "When did you first contact Ginsburg?" The answer would be: "About December, 1947."

Mr. Heafey: That is all right.

Mr. Boyd: Very satisfactory. Now, on page 29, counsel, line 25 until 30, We have additional testimony, your Honor, about the wife being returned by the sheriff, and so forth, and I understand your Honor's ruling you feel that is admissible under the theory of permission?

The Court: That is right. In other words, an inference must be drawn from that that he didn't give his wife permission to take his car. The jury has a right to draw that inference.

Mr. Castro: Even where the criminal charge was dismissed, your Honor?

The Court: I would think so.

Mr. Castro: I think the record should show the criminal charge was dismissed for insufficiency of the evidence.

Mr. Heafey: Going to put that in, we have to put all the documents about the issuing of a complaint and the date, and so forth.

Mr. Boyd: If we do have this read into the record that the lady was charged with a crime, certainly it would be permitted to show that it was dismissed by insufficiency of the evidence. Otherwise, the jury might draw the conclusion that [47] she was guilty and convicted of the crime.

The Court: I think that there ought to be some evidence to that effect, either by stipulation or statement.

Mr. Heafey: We will stipulate to it Judge.

The Court: Because I think the full facts ought to be in, whether they may have been reconciled so he didn't prosecute the charge, and so forth, ought to be brought to the attention of the jury that the charge was dismissed on the ground of lack of insufficiency of the evidence.

Mr. Boyd: It may be stipulated, counsel, that the charge was dismissed for insufficiency of the evidence?

Mr. Heafey: That is right, on January 9, 1948.

Mr. Boyd: I believe that is all the objections we have, your Honor.

The Court: Yes, there is a statement in there by Ronin, who was a district attorney, sending for his wife and bringing her back.

Mr. Bledsoe: I just wanted to establish that was done before the accident happened.

Mr. Heafey: The 16th of October.

The Court: All right, Mr. Linehan, bring the jury in.

(The following proceedings were had in the presence of the jury.)

The Court: Will you stipulate that the jury is here?

Mr. Boyd: Yes, your Honor. [48]

Mr. Heafey: Yes, your Honor.

At this time, if the Court please, the defendant

offers in evidence and asks permission to read to the jury the deposition of G. Henry Crane, which was taken by stipulation on the 20th day of December, 1949, at the offices of Davis, Stubbs & Healey, 1521 Sharp Building, Lincoln, Lancaster County, Nebraska, on behalf of the defendant, the State Farm Mutual Automobile Insurance Company.

The Court: Do you want to read all of it, or want to have somebody read the questions and somebody read the answers?

Mr. Heafey: What is your practice?

The Court: I think it would be better for the jury if we followed that.

Mr. Heafey: I can read the questions and Mr. Bledsoe the answers.

The Court: Yes.

Mr. Heafey: And at the time these depositions were taken, there were present on behalf of the plaintiff in this action, Mrs. Porter, Mr. Robert C. Guenzel, of Pansing & Guenzel, attorneys-at-law, 414 Federal Securities Building, Lincoln, Nebraska, and Mr. Daniel Stubbs, of Davis, Stubbs & Healey, attorneys-at-law, 1521 Sharp Building, Lincoln, Nebraska, appearing on behalf of the State Farm Mutual Automobile Insurance Company.

The Court: I think, Mr. Heafey, since there are only two [49] copies of that and the other side will want to follow one copy, you'd better go ahead and read it all yourself.

Mr. Heafey: Shall I sit on the witness stand?

The Court: Yes.

Mr. Heafey: "Direct Examination by Mr. Stubbs:"

G. HENRY CRANE

produced as a witness on behalf of the defendant The State Farm Mutual Automobile Insurance Company, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct Examination

By Mr. Stubbs:

Q. Your full name, Mr. Crane.

A. G. Henry Crane.

Q. And what is your present employment?

A. The First National Bank.

Q. What is your position with the First National Bank? A. Assistant cashier.

Q. Are you in charge of the Department of Car Loans also? A. Yes, sir.

Q. And you have been in that employment or in that capacity how long?

A. About six years.

Q. So you were so employed during the entire year of 1947? A. Yes.

Q. And in that capacity, and on behalf of the First National Bank, did you have any business dealings with Mr. Wilbur M. Mehlin?

A. Yes.

Q. And what did that business transaction relate to, Mr. Crane?

A. It was in connection with a loan.

(Deposition of G. Henry Crane.)

Q. And that loan was made by whom?

A. Wilbur M. Mehlin.

Q. And who loaned him the money?

A. I did.

Q. Now, in connection with that loan, was there any security taken?

A. Yes; a 1936 Ford Coach.

Q. You mean you took a chattel mortgage on that automobile? A. Yes.

Q. And can you further describe the automobile? A. Oh, just the motor number.

Q. You may give that.

A. No. 2-922886.

Q. And that automobile was owned by him at that time? A. Yes.

Q. And when was the loan made, Mr. Crane?

A. Well, it was July 17, 1947.

Q. Was there a loan made prior to that time?

A. There was.

Q. And when was the first loan made?

A. (Referring to memorandum) February 3, 1947.

Q. How much was the loan?

A. The original loan?

Q. Yes. A. \$375.84.

Q. And to secure that loan you took the chattel mortgage that you have described?

A. I did, yes.

Q. On the automobile that you described?

A. Yes.

(Deposition of G. Henry Crane.)

Q. Now, that loan was refinanced on July 17, was it? A. Yes.

Q. And what was the amount of the loan at that time? A. You mean the original loan?

Q. Yes. A. \$363.66.

Q. And did you continue or hold the chattel mortgage on the automobile you have described?

A. I did.

Q. In connection with the refinancing?

A. Yes.

Q. And on that same automobile that you have previously described? A. Yes.

Q. Was that loan and chattel and mortgage in effect on August 22, 1947? A. Yes.

Q. And had there been some payments on it prior to that time? A. August 5.

Q. How much was paid on it? A. \$24.25.

Q. And what was the balance then on August 22, 1947? A. \$339.71.

Q. And you held a chattel mortgage on the automobile you have described on August 22, 1947, to secure that loan? A. Yes.

Q. Now, were there any further payments after August 27?

A. September 2, September 29, November 4, and December 23, 1947, and January 14 of 1948, and the unpaid balance on January 30, 1948.

Q. Perhaps you should state what payments were made on each of those dates, Mr. Crane.

A. \$24.25 on each date except the last one, \$218.16.

(Deposition of G. Henry Crane.)

Q. So that loan was gradually paid down to \$218.16? A. Yes.

Q. And that full balance was paid on what date?

A. January 30, 1948.

Q. And at that time you released the mortgage and turned back the note to Mr. Mehlin?

A. Yes.

Q. The mortgage had not been released at any time prior to that? A. No.

Mr. Stubbs: I think that's all. Do you have any cross?

Mr. Guenzel: I have just one question.

Cross-Examination

By Mr. Guenzel:

Q. Did you on behalf of the bank, or the bank on its own behalf, ever cause to be filed any legal action relative to this note for the chattel mortgage which you have described? A. No.

* * *

Mr. Boyd: For the record, we would like to state on behalf of the plaintiff, we will waive the cross-examination of all of these witnesses in the depositions. We do not desire to read any part of the cross-examination or any part of the depositions ourselves.

The Court: Well, I assume, it being a deposition, the other side can use the cross-examination.

Mr. Heafey: That is correct.

Mr. Boyd: I wanted to make clear we wouldn't request the reading of the cross-examination.

Mr. Heafey: You don't mind if I continue?

Mr. Boyd: Whatever you care to do, counsel.

Mr. Heafey: And then we offer in evidence the deposition of Wilbur M. Mehlin, taken at the same time and place and with the same attorneys present on behalf of the same parties. We ask permission to read this deposition to the jury.

The direct examination by Stubbs:

WILBUR M. MEHLIN

Direct Examination

By Mr. Stubbs:

Q. Your full name, please.

A. Wilbur M. Mehlin.

Q. And you are the Wilbur M. Mehlin who owned a 1936 Ford Tudor automobile with motor 2-922886, during 1947? A. Yes.

Q. And that automobile was later involved in an accident in California? A. Yes.

Q. Now, where do you live, Mr. Mehlin?

A. 3108 Starr Street.

Q. In Lincoln? A. Yes.

Q. And where did you live in October of 1947?

A. 210 North Twenty-ninth.

Q. And both of those addresses are in Lincoln, Nebr.? A. Yes, sir.

Q. What relation do you bear to Carol Mehlin?

A. Husband.

Q. Were you the husband of Carol Mehlin in October of 1947? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. When did you first acquire the automobile that you have described, Mr. Mehlin?

A. I got the automobile in January, 1946.

Q. And was it registered in your name?

A. Yes.

Q. In that year 1947 did it have any mortgage against it?

A. Yes, it did.

Q. And you had made a loan which was secured by that mortgage?

A. Yes.

Q. And where did you make the loan?

A. The First National Bank of Lincoln, Nebraska.

Q. And do you remember when you first made that loan, Wilbur?

A. When I first made it?

Q. Yes, the one with the First National Bank.

A. Let's see. The exact date I couldn't say.

Q. Well, about when, to the best of your recollection?

A. To the best of my ability, it would be in July, 1947.

Q. Could it have been earlier than that, if the bank's records showed that it was?

A. If the bank's records showed that it was, yes. The exact date I don't know.

Q. And approximately how much was the amount of the mortgage?

A. Approximately \$375.

Q. You executed and gave to the bank a chattel mortgage on the automobile you have described?

A. Yes.

Q. To secure that loan?

A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. And was there still a balance owed on that loan August 22, 1947? A. Yes.

Q. And the car was mortgaged to secure that loan on that date? A. Yes.

Q. Was the mortgage still existing on the car during all of October, 1947? A. Yes.

Q. Can you give me the approximate amount of the mortgage existing on the car on August 27, 1947?

A. Approximately \$350, to the best of my ability.

Q. And what was the amount of the unpaid balance on the mortgage during the month of October, 1947? A. Approximately \$250.

Q. During the month of October, 1947, where were you living? A. Sir?

Q. Where did you live during the month of October, 1947?

A. At 210 North Twenty-ninth.

Q. And were you and your wife residing together at that time? A. Yes.

Q. You had a child at that time?

A. Yes.

Q. Just the one? A. One, yes, a boy.

Q. And how old was he?

A. At that time?

Q. Yes. A. Three.

Q. He was three years old? A. Yes.

Q. Now, did anything happen between you and your wife during the early part of October?

(Deposition of Wilbur M. Mehlin.)

A. No.

Q. Do you know about when it was that your wife left and went to California?

A. On or about October 14.

Q. Now, did you have any knowledge at that time that she was going to California?

A. No, sir.

Q. When did you first discover it?

A. When she left or——?

Q. Yes.

A. I had went to work in the morning and in the evening I knew she was gone.

Q. When you returned home? A. Yes.

Q. What did she take with her?

A. She took all of her personal belongings and some household belongings.

Q. Did she take this car that you have described? A. Yes, she took the car.

Q. Did you on or before that time give your wife permission to take your car to California?

A. No, sir.

Q. At the time that you discovered she was gone, did you know where she had gone?

A. No, I did not.

Q. You didn't discover where she had gone until afterwards?

A. Until afterwards; that's right.

Q. Did she, in going to California, go upon any business of yours? A. No, sir.

Q. Did you have any business to be transacted in California? A. No.

(Deposition of Wilbur M. Mehlin.)

Q. By her or anyone else? A. No.

Q. At the time the accident occurred in California on the 31st day of October, 1947, where were you?

A. I was in Lincoln, Nebraska.

Q. And what employment did you have at that time?

A. I worked at Cushman's Motor Works.

Q. Prior to that time, what employment had you had, Mr. Mehlin?

A. Cushman Motor Works.

Q. You had worked there commencing about when?

A. I went to work for Cushman's in March of 1942.

Q. And, of course, you were in the service?

A. Yes.

Q. So, while you were in the service, you were not working for Cushman's? A. No.

Q. As soon as you came back you started working for them again? A. Yes.

Q. And you had worked there continuously up until the time that your wife left, as you have described? A. Yes.

Q. And for some time after that?

A. Yes.

Q. How long after that did you work at Cushman's?

A. I worked at Cushman's until April of 1949.

Q. And where did you live during all of that time?

(Deposition of Wilbur M. Mehlin.)

A. All of that time I worked at Cushman's?

Q. Yes.

A. I lived at 210 North Twenty-ninth and 3108 Starr.

Q. And when did you move to 3108 Starr Street? A. Sometime in January of '48.

Q. And you have been living right here in Lincoln all of the time? A. Yes.

Q. And you worked at Cushman's until April of this year? A. Yes.

Q. Since that time where have you been working?

A. I worked during the summer out at the State Hospital, and then a short time this fall I worked for Bullocks Sodding Company, and at present with the Vermaas Service Station.

Q. And all of that has been right herein Lincoln, Nebr.? A. Yes.

Q. And you have lived at no other places except these two addresses you have given me in Lincoln, Nebr.?

A. I resided with my folks for a while, while she was gone.

Q. Now, had you prior to October 31, 1947, signed an application for a driver's license within the State of California? A. No.

Q. Had you at any time executed an application for a driver's license with any other person for a driver's license in the State of California?

A. No.

(Deposition of Wilbur M. Mehlin.)

Q. Did you on October 31, 1947, have any acquaintance with Duane R. Claggett?

A. No.

Q. Did you ever know him? A. Never.

Q. You don't know him now? A. No, sir.

Q. So that Duane R. Claggett on October 31, 1947, did he have any business of yours to transact or on your behalf in the State of California?

A. No.

Q. Did you at any time prior to October 31, 1947, or on that date give Duane R. Claggett permission to drive your 1936 Ford automobile, which you have described? A. No.

Q. Do you have any knowledge that on the 31st day of October, 1947, or at any time prior to that date, that Duane R. Claggett did drive your automobile? A. No.

Q. Now, prior to that time when Mrs. Mehlin, your wife, left you in October of 1947, who lived with you in your household?

A. My wife and boy.

Q. Do you still have the automobile that you have described? A. No.

Q. What happened to it?

A. There was some liability when it was wrecked, and it was towed into a place in California and left there.

Q. Was it finally sold? A. Yes.

Q. And did you sign a bill of sale to someone in California? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. And when did that occur?

A. Approximately in April or May of 1948.

Q. And at the time it was sold, it was still registered in your name? A. Yes.

Q. Now, when you bought the car where did the money come from to purchase it?

A. I had my mustering out pay from the Army, and my wife had a little money in the bank, that I got a chance to pay the balance.

Q. Now, where did this money in the bank come from?

A. Out of some money that I had sent while I was in the Army.

Q. When you discovered that your wife had left, did you see anybody about it? A. Yes.

Q. Did you see any officers about it?

A. I went to the County Attorney's office.

Q. And whom did you see there?

A. Mr. Ronin.

Q. And you told Mr. Ronin what had happened?

A. Yes.

Q. And what did you ask Mr. Ronin to do?

A. To try to locate my boy and wife.

Q. Did you cause a complaint to be filed against your wife? A. Yes.

Mr. Stubbs: Will you mark this for identification?

(Marked for identification Exhibit No. 1, witness Mehlin.)

Q. (By Mr. Stubbs): Now, handing you what

(Deposition of Wilbur M. Mehlin.)

the reporter has marked Exhibit 1, is that the complaint that you caused to be filed against your wife? A. Yes.

Q. And the signature "Wilbur M. Mehlin" at the bottom of Exhibit 1, is that your signature and did you sign that complaint? A. Yes, sir.

Q. And did you sign it before the clerk of the court? A. Yes, sir.

Q. And what date did you sign that complaint?

A. (Referring to Exhibit 1) October 23, 1947.

Q. And was it filed that day in the Municipal Court of the City of Lincoln, Nebraska?

A. Yes.

Q. And do you know if efforts were made to bring your wife back from California after this complaint was signed? A. Yes.

Q. Who made those efforts?

A. The County Attorney.

Q. You mean Mr. Ronin, the Deputy County Attorney? A. Yes, sir.

Q. Was your wife finally returned to Nebraska?

A. Yes, sir.

Q. Do you know whether she made appearances in court on this complaint? A. Yes.

Q. Now, at some later time did you and you and your wife become reconciled? A. Yes.

Q. And that was some time after she had been returned to Nebraska? A. Yes.

Q. Had she been back in Nebraska some time before that reconciliation took place?

(Deposition of Wilbur M. Mehlin.)

A. Yes.

Q. And about when, then, did she join your household again?

A. About January of '48.

Q. At the time you filed this complaint on the 23rd day of October, 1947, did you know about any accident in which the car was involved?

A. No.

Q. It hadn't happened yet, had it, Mr. Mehlin?

A. No, not that I know of.

Mr. Stubbs: I think that's all.

* * *

Mr. Castro: May the record be completed, your Honor, concerning the criminal proceedings at this time, so there may be continuity in the jury's mind?

The Court: You were going to stipulate——

Mr. Heafey: Stipulate to the effect that this complaint which was filed by Mr. Mehlin on the 23rd day of October, 1947, in which Carol Doris Mehlin was charged with taking mortgaged property out of the state of Nebraska without the consent of the mortgagee was subsequently, in January of 1948, on January 9, 1948, dismissed by the county attorney for insufficient evidence.

Cross-Examination

By Mr. Guenzel:

Q. When were you married to Carol Mehlin?

A. We were married on February 12, 1941.

(Deposition of Wilbur M. Mehlin.)

Q. Where did this marriage take place?

A. Humboldt, Nebraska.

Q. Following your marriage, then, you came to Lincoln and you were employed here, is that right?

A. Not immediately, no.

Q. You came to Lincoln in 1942, is that right?

A. Yes.

Q. After you were married did Mrs. Mehlin ever work?

A. Yes.

Q. Where did she work.

A. Do you mean before this happened?

Q. Well, since your marriage, yes. Subsequent to your marriage. After you were married, you said, she worked, and I am asking this: Where did she work after you were married?

A. She worked at Walgreen's in Lincoln here, and she worked at the Rusco Window Company and at Boomer's Printing Company.

Q. And over what period of time was she employed there? In other words, has she worked all the time since you were married?

A. She worked after she came back from California.

Q. Did she ever work before she went to California?

A. No.

Q. You said when you bought this automobile you purchased it with your mustering out pay from the Army?

A. Yes.

Q. And with some money that your wife had in the bank, and the balance you paid?

A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. Why did you buy the automobile?

A. For personal business.

Q. After you purchased the automobile, who used it? A. My wife and I.

Q. Did your wife have a license to drive the automobile? A. Yes, sir.

Q. Approximately how often did she use the car? In other words, did you leave it at home during the day while you were at work, or what was your custom? What did you usually do?

A. Oh, I would leave it at home two or three times a week for her to go to the store and what business she had.

Q. When did you first learn of the accident that occurred on the 31st of October?

A. Well, I didn't know about it for sure until after she had come back.

Q. How did you first learn of the accident? Did she tell you? Is that the way that you learned it, or did she write about it, or how did you find out about it?

A. (Witness hesitates.) I'm not positive.

Q. Beg pardon?

A. Just how, I'm not positive.

Q. But you learned about it about the time that she came back? A. Yes.

Q. And she either told you or perhaps her mother told you, or something like that, is that right? A. (No response.)

Q. Is that right, Mr. Mehlin? That she told

(Deposition of Wilbur M. Mehlin.)

you or perhaps her mother told you when she came back? A. I'm not sure.

Q. When were you first contacted by anyone from the State Farm Mutual Insurance Company about the accident? A. The exact dates?

Q. No. Approximately. Just the month.

A. I would say you could find out this information from Joseph Ginsburg, the attorney, because exactly I don't know. It's been some time ago, and I would hate to say.

Q. Do you remember when you were first contacted by The State Farm? Did they write you a letter or send you a telegram, or did someone come to see you?

A. I think I got a letter about the matter, and I just had a deposition made of it.

Q. Do you have that letter?

A. That I would have to look up.

Q. Would you look for it and see if you can find it? A. Yes, sir.

Q. Do you remember who wrote the letter?

A. I'm not sure, no.

Q. What did you do after you received the letter?

A. I waited for contact with the deposition and the lawyers to come out and take the depoistion.

Q. Did you ever make a written report to The State Farm relative to the occurrences leading up to the accident? A. Personally, no.

Q. Have you ever heard the name of the firm of attorneys of Dana, Bledsoe & Smith?

(Deposition of Wilbur M. Mehlin.)

A. Yes.

Q. When did you first hear those names?

A. I don't know.

Q. Do you remember who first told you about these attorneys? A. No.

Q. Was that in the letter you got from State Farm? A. That I'm not sure.

Q. Did you ever receive a letter from Dana, Bledsoe & Smith? A. I don't know.

Q. When did you first contact the firm of Ginsburg & Ginsburg?

* * *

Q. Who advised you; or did anyone advise you to have Ginsburg & Ginsburg write a letter to Dana, Bledsoe & Smith?

A. Nobody advised me that I know of, no.

Q. Did you know that Dana, Bledsoe & Smith had received a letter from Ginsburg & Ginsburg, wherein Ginsburg & Ginsburg represented themselves as your attorneys relative to this accident?

A. Repeat that again, please.

(Question read.)

A. (No response.)

Q. Did you know that such a letter had been written? A. I'm not sure.

Q. Do you remember ever asking Ginsburg & Ginsburg to write such a letter?

A. I'm not sure.

(Deposition of Wilbur M. Mehlin.)

Q. Now, going back to a year ago this summer, which was when the letter was written, do you remember having any conferences with Ginsburg & Ginsburg concerning this accident?

A. The conferences I remember of having with them was over the settlement on the car.

Q. Did you ever pay Ginsburg & Ginsburg for any services rendered concerning the accident other than the settlement in connection with the sale of the car?

A. To the best of my knowledge, no.

Q. Have you ever been interviewed by anyone from the State Farm Mutual Insurance Company about the accident? A. How do you mean, sir?

Q. Well, I mean like—not as formal as the taking of a deposition, but has anyone from State Farm ever come and asked you questions about the accident—about the events leading up to your wife's leaving for California?

A. No, I don't believe so.

Q. Where did you obtain your insurance policy with State Farm? A. From Mr. Ludlam.

Q. That was here in Lincoln? A. Yes.

Q. At the time you applied for your insurance did you make any written application?

A. I applied for the policy, yes.

(Deposition of Wilbur M. Mehlin.)

Q. Did you fill out a written form in applying for the policy, do you remember?

A. Yes, there was a form made out.

Q. Did that form contain any statement inquiring about mortgages on the car?

A. To the best of my knowledge, no.

Q. Do you have a copy of that written application? A. I will look, sir.

Q. But you don't know whether you have any or not?

A. Whether I still have or not, I don't know, or ever did have.

Q. Now, when your wife came back from California, did she come back voluntarily or was she brought back by officers?

A. I think she came back voluntarily.

Q. Didn't she come back with her mother?

A. Yes, sir.

Q. When you paid Ginsburg & Ginsburg for the services they rendered, did you get any receipt or anything like that?

A. Just a receipt for the amount, I believe.

Q. Do you have that receipt?

A. That I would have to look for too.

Q. I would like to have you look for it and see if you can find it. A. I will.

Mr. Guenzel: That's all the questions I have.

Redirect Examination

By Mr. Stubbs:

Q. Mr. Mehlin, when your wife returned, you

(Deposition of Wilbur M. Mehlin.)

knew the officers were attempting to effect her return here? A. Yes.

Q. And when you say she came voluntarily, what do you mean by that? Do you mean that she waived extradition in California?

A. Yes.

Q. Did she come back in the custody of someone? A. Her mother came back with her.

Q. Do you know whether her mother had been appointed or deputized to return with her by the officers in Nebraska? A. I'm not sure.

Q. Now, all of the time since October, 1947, until the present time you have been right here in Lincoln? A. Yes.

Q. And have you made any effort to hide or make yourself hard to find? A. No.

Mr. Stubbs: All right. That's all.

Mr. Guenzel: That's all.

I now offer in evidence the deposition of Carol Doris Mehlin, which was taken at the same time and place and with the same attorneys present.

The Court: I think, Mr. Heafey, we will take an adjournment for a few minutes. Ladies and gentlemen, during the adjournment bear in mind the admonition I have heretofore given [51] you.

(Brief recess.)

Mr. Heafey: The deposition of Carol Doris Mehlin:

CAROL DORIS MEHLIN

Direct Examination

By Mr. Stubbs:

Q. Your name is Carol Doris Mehlin?

A. That's right.

Q. And you now live at 3108 Starr Avenue,
here in Lincoln, Nebraska? A. Yes.

Q. And you are the wife of Wilbur Mehlin?

A. Yes.

Q. How long have you been married to Mr.
Mehlin? A. Nine years this February.

Q. Prior to the 14th day of October, 1947, where
did you live?

A. 210 North Twenty-ninth Street.

Q. And you lived with your husband, Wilbur
Mehlin, there? A. That's right.

Q. And you had one child at that time?

A. Yes.

Q. Now, did you in the month of October, 1947,
leave Lincoln? A. Yes, I did.

Q. And on what day did you leave?

A. October 14.

Q. And how did you leave Lincoln? In what
manner? A. You want the transportation?

Q. Yes. A. In a car—a '36 Ford.

Q. That was the 1936 Ford Tudor automobile
which was owned by your husband?

A. That's right.

Q. Now, when you left Lincoln, Carol, where
did you intend to go? A. California.

(Deposition of Carol Doris Mehlin.)

Q. Did you have your husband's permission to drive the automobile to California at that time?

A. No, I did not.

Q. Had you had some difficulty with your husband prior to that time? A. Some.

Q. And when you left home what was your intention as to whether you were separating from him at that time?

A. Well, that was the intentions, that I was going to stay.

Q. You didn't tell him you were going?

A. No.

Q. Besides the car, what did you take with you?

A. I took my son and personal belongings.

Q. And you intended to separate from him and his household at that time? A. Yes.

Q. You didn't intend to come back?

A. No.

Q. Did you drive directly to California?

A. That's right.

Q. And where to in California?

A. Richmond, California.

Q. Now, who went with you to California?

A. Is that necessary?

Q. Well, it has all been written out before, Carol.

A. Paul Weisberger and Phil Curren.

Q. And your son?

A. And my son, that's right.

Q. Did anyone who went with you have your

(Deposition of Carol Doris Mehlin.)

husband's permission to drive or take your husband's automobile at that time? A. No.

Q. Did any of these other persons have any business to conduct on behalf of your husband?

A. No, they did not.

Q. Did you have any business to transact in California on behalf of your husband?

A. No, I did not.

Q. Were you in the automobile at the time it was involved in an accident on the 31st day of October, 1947? A. No, I was not.

Q. Do you recall whether the sheriff out there had contacted you at that time yet, or not, Carol, about the complaints filed here?

A. Do you mean while I was out there?

Q. Yes.

A. No. I didn't know anything about it until I came home.

Q. Well, when did you first learn about the accident?

A. Well, I knew the accident had happened that evening.

Q. In a short time after it happened?

A. Yes.

Q. The driver came back and told you?

A. That's right.

Q. Where were you at the time the accident happened? A. In Richmond.

Q. Whom were you staying with there?

A. Carl Claggett and his family.

(Deposition of Carol Doris Mehlin.)

Q. And they are relatives of yours?

A. No.

Q. Do you know who was driving the car at the time of the accident? A. Duane Claggett.

Q. And was he on any business of yours or your husband's at the time? A. No, he was not.

Q. Did Duane Claggett tell you what he was driving the car for?

A. The only thing I knew was that he had a date in Oakland.

Q. You don't have and never did have a driver's license in California? A. No, I did not.

Q. Mr. Duane Claggett—was he in Lincoln at any time? A. Not that I ever knew, no.

Q. He was not here in October, 1947?

A. No.

Q. And you met him only after you arrived in California? A. That's right.

Q. Had you known Duane Claggett before you arrived in California at all? A. No.

Q. You had met him only after you had got out there, after leaving here on the 14th day of October, 1947? A. That's right.

Q. Were you arrested in California, Carol?

A. Yes, I was.

Q. Did they put you in jail out there?

A. That's right.

Q. You were arrested on a complaint filed by your husband here?

A. I don't know whose complaint it was. I was arrested for taking a car out of the State.

(Deposition of Carol Doris Mehlin.)

Q. And how were you brought back to Nebraska?

A. Well, I came back with my mother. My mother brought me back.

Q. Do you know whether your mother had been authorized to bring you back by the authorities here in Nebraska? A. Yes.

Q. Do you remember the day you arrived back in Lincoln? A. Not exactly I don't.

Q. Were you taken——

A. (Interrupting): It was somewhere in there of December. I'm not sure at all. I know the next day I went to court here.

Q. The next day you went up to the Municipal Court? A. Yes.

Q. And what happened there?

A. I was out on bond until the trial came up.

Q. And the case was ultimately dismissed?

A. That's right.

Q. And it was some time after the case was dismissed that you became reconciled again with your husband? A. That's right.

Q. And about when did you become reconciled with your husband again?

A. February the following year, or in March.

Q. In 1948? A. Yes.

Mr. Stubbs: You may inquire.

Cross-Examination

By Mr. Guenzel:

Q. Mrs. Mehlin, when did you get married to

(Deposition of Carol Doris Mehlin.)

Wilbur Mehlin? A. February 12, 1941.

Q. And where were you married?

A. Humboldt, Nebraska.

Q. After you were married, were you ever employed anywhere? Did you ever work?

A. No.

Q. Have you ever had a driver's license in Nebraska—a Nebraska driver's license?

A. Yes, sir.

Q. Did you have one in 1946?

A. Yes, I did.

Q. Do you remember when Mr. Mehlin bought the car in question? A. Yes.

Q. After he got that car did you drive it?

A. Quite a bit, yes.

Q. Did you start driving the automobile immediately after it was purchased? A. No.

Q. Well, I mean——

A. (Interrupting): It was quite a while yet before I received my driver's license.

Q. After the purchase of the car, then, you got a driver's license? A. Yes.

Q. And after you got the driver's license, then you started driving the car, is that right?

A. That's right.

Q. Did you put any money into the purchase of the car? A. No.

Q. About how often did you drive the automobile?

A. I wouldn't know. Not very often. Just to town during the week.

(Deposition of Carol Doris Mehlin.)

Q. You would use it for going shopping?

A. That's right.

Q. And Wilbur knew you were using it for shopping and he let you use it for that purpose?

A. That's right.

Q. And he let you use it to drive around town to see your friends?

A. Well, I could use it any time I wanted the car.

Q. Now, after the accident occurred out in California, did you report the accident to anyone connected with The State Farm Mutual?

A. Yes, I did.

Q. When did you do this?

A. It wasn't very long after the accident. Just a few days, I imagine.

Q. Where did you report it?

A. Berkeley. I think the office is in Berkeley.

Q. Were you ever interviewed by anyone from State Farm? Did they ever sit down and talk to you about the accident?

A. There was a man come out from Berkeley one afternoon when we were in Richmond, but it didn't have a great deal to do with me. It had a great deal to do with Duane and his trial.

Q. But he did talk to you at that time?

A. Yes.

Q. Do you remember the name of that man at all?

A. No.

Q. Did you ever make any written report to The State Farm about the accident?

(Deposition of Carol Doris Mehlin.)

A. I think I filled out a form, yes.

Q. You filled out a form when you went to Berkeley to report it? A. That's right, yes.

Q. Do you have a copy of that?

A. No, I do not.

Q. Were you ever interviewed by anyone from the office of Dana, Bledsoe & Smith, attorneys?

A. Where from?

Q. Out in California. A. I don't think so.

Q. Now, since you made that first report of the accident to State Farm, since that first time when the representative came out from Berkeley to talk to you—Claggett and you too—have you ever been interviewed by anyone from State Farm?

A. No, not interviewed, except that last time they took the deposition.

Q. That is the only time?

A. That's the only time.

Q. Had you ever before this time driven the car outside the city limits of Lincoln, say?

A. No. I don't believe I ever have.

Q. Had you ever allowed anyone else to drive the car? A. No.

Q. Had your husband ever told you not to let anyone drive the car? A. Yes.

Q. Did you ever sign a reservation of rights agreement with State Farm?

A. I don't know what that is.

Q. Well, it would be a formal agreement reserving certain rights. A. No.

(Deposition of Carol Doris Mehlin.)

Q. On the day of the accident when Claggett took the car, did you know he was using the car?

A. Yes, I knew he was using it. After he left with it I was pretty sure he was using it.

Mr. Guenzel: That's all.

Mr. Stubbs: I guess that's all, Carol.

Mr. Boyd: Counsel, on this question on page 27, relative to the conversations with Mr. Ginsburg, I understand it may be stipulated that those conversations were in connection with collision damage with the automobile, the settlement of the car, on the bottom of pages 27 and 28, I believe it can be stipulated that that was relative to the settlement of the collision, the settlement of the car?

Mr. Heafey: That's right.

Mr. Bledsoe: That is the sale you are talking about.

Mr. Boyd: Very well.

Mr. Heafey: Mr. Hunt, will you take the stand, please?

WILLIAM R. HUNT

called as a witness on behalf of the defendants,
sworn.

The Clerk: Will you state your name to the Court and jury?

A. My name is William R. Hunt.

(Testimony of William R. Hunt.)

Direct Examination

By Mr. Heafey:

Q. Mr. Hunt, what is your business or [52] occupation?

A. I am with the State Farm Insurance Company in Berkeley.

Q. In what capacity?

A. Assistant superintendent of claims for Northern California.

Q. And how long have you occupied that position? A. Well, let's see, about four years.

Q. Now, on the 31st day of October, 1947, you were occupying the position as assistant superintendent of claims?

A. Well, I was working inside. I am not sure just when I received the title of assistant, but I was working inside at the time assisting Mr. Meyers, the superintendent of claims.

Q. Assistant to the manager?

A. That's right.

Q. The manager of the claims department for Northern California?

A. Assistant to the superintendent.

Q. Superintendent of claims? A. Yes.

Q. Now, did you have jurisdiction over the claims that came in for Northern California?

A. That is right.

Q. And that would include Richmond, California; is that right? A. That is correct.

(Testimony of William R. Hunt.)

Q. Now, I will ask you whether or not some time in November of 1947 a proof of loss was filed by a Mrs. Wilbur Mehlin notifying you that an accident had occurred? [53]

A. That is correct. I think it was on November 3 it was reported. That's correct, November 3, 1947.

Q. Mr. Hunt, I will show you what purports to be a Proof of Loss with the signature Mrs. Wilbur M. Mehlin, and I will ask you if that is the proof of loss which was filed with your company on or about the 3rd day of November, 1947?

A. Yes, this is the one; yes.

Q. And from that proof of loss did you get notice to the effect that an accident had occurred?

A. Yes, this was the first notice we received.

Mr. Heafey: At this time, if the Court please, we offer this proof of loss in evidence and ask that it be marked defendants' first number.

Mr. Boyd: Your Honor please, we have no objection to the proof of loss being offered for the purpose of showing that the company received notice of the accident. However, the proof of loss itself contains other matters that we think are self-serving and hearsay.

Mr. Heafey: Will you point it out to me?

Mr. Boyd: We will stipulate, your Honor, that they received notice on November 3, 1947, if that is the purpose it is being offered for.

Mr. Heafey: That is the purpose, your Honor,

(Testimony of William R. Hunt.)

to show that on the 3rd day of November, 1947, notice was given by Mrs. Wilbur Mehlin, 1106 Main Street, Apartment H, to the effect that [54] an accident had occurred on October 31, 1947, at approximately eight o'clock in the evening in the city of Richmond.

Mr. Boyd: Stipulate, your Honor, that may be—stipulated that they received notice at that time.

Mr. Heafey: Counsel, there is another part that I want.

Q. Now, I will show you this proof of loss, Mr. Hunt, and I will ask you whether or not anything on that proof of loss stated with whose permission the car was being driven at the time of the accident?

Mr. Boyd: Your Honor please, we object to it, calls for hearsay. We don't have the right to cross-examine the parties that alleged to have made the statement on the so-called proof of loss. We don't think it is admissible, entirely self-serving.

Mr. Heafey: It goes to the purpose as to what notice the company had, your Honor.

Mr. Boyd: They had notice of the accident, your Honor.

Mr. Heafey: We want to know what notice as to who was driving the car and with whose permission.

The Court: I will allow it on account of the allegations of estoppel and waiver.

The Witness: The proof of loss says that the car was driven by Duane Claggett and driven with the permission of the wife.

(Testimony of William R. Hunt.)

Q. (By Mr. Heafey): And that was stated on the face of the proof of loss, is that right? [55]

A. That's right.

Q. Is that proof of loss signed by someone?

A. It is signed on the back by Mrs. Wilbur M. Mehlin.

Q. I see. Mr. Hunt, did you subsequently have any conversations with an attorney by the name of Augustus Castro with reference to this case?

A. Yes, I did. I had at least one, possibly two.

Q. And do you recall when the first conversation was that you had with him?

A. Well, I can give you an approximate date on that, I think. Should have marked that—I have a memorandum here, you don't have the approximate date there, do you?

Q. Well——

Mr. Bledsoe: I think you have it marked, Mr. Hunt.

Mr. Heafey: January 28, 1948, I believe, according to the testimony, Mr. Castro.

The Witness: I have a memorandum in the file here, January 28, 1948, at the time I had a discussion with attorney Castro.

Q. (By Mr. Heafey): Well, will you give us the substance of that discussion, please?

A. Mr. Meyers, the superintendent of claims, referred the file to me, because suit had been filed and asked me to get a stipulation to protect our time and also to discuss possible settlement with Castro to see what could be done. [56]

(Testimony of William R. Hunt.)

Q. Then did you discuss the matter of settlement with him at that time?

A. I asked him, Mr. Castro, what he had in mind, what he would recommend to his client. He said he might recommend a figure of \$9,000 and I told him at that time we felt the figure was out of line, and after discussing the matter with Mr. Meyers, made an offer of \$7,500.

Q. And did you subsequently have another conversation with Mr. Castro?

A. Well, I don't recall having another conversation with him. I don't have a memorandum in the file covering it.

Q. You don't recall ever calling Mr. Castro on or about the 5th day of February, 1948?

A. Well, I didn't call him; he might have called me.

Q. I see. Well, there is a possibility that conversations could have occurred on or about that time by telephone?

A. Possible.

Q. And you wouldn't have made a notation of that?

A. I wouldn't have made a notation on the file.

Q. It is possible in that conversation you discussed the matter of settlement, is that right?

A. That is right.

Q. Was the file subsequently referred to your attorneys?

A. Yes, it was.

Q. Now, prior to the time the file was referred to the attorneys, [57] did you assign the file to some one for investigation?

(Testimony of William R. Hunt.)

A. Yes. Originally the file was assigned to John Dennis, one of our traveling adjustors, for investigation.

Q. I see. Now then, did Mr. Dennis take a statement from Duane Claggett, the driver of the car?

A. Yes, he did.

Q. And have you that statement in your file?

A. I don't know if we have the original or not. The original may be in Mr.——

Q. The original——

A. (Continuing): In Mr. Bledsoe's file. Here is a copy of it. Taken November 7, 1947. It is a two and one half page statement.

Q. I will show you, Mr. Hunt, what purports to be the original statement signed by Duane R. Claggett, and will you refer to that for a moment, please. What is the date of that statement?

A. November 7, 1947.

Q. And that statement was obtained by one of your adjustors, was it?

A. This was obtained by adjustor John Dennis.

Q. Will you refer to that statement now and tell me if there is any mention in the statement concerning permission to drive the automobile and with whose permission Mr. Claggett was driving the automobile at the time of the accident?

Mr. Boyd: Your Honor please——

The Court: Separate those two, whether there is any [58] statement in there concerning permission.

(Testimony of William R. Hunt.)

Mr. Heafey: Permission?

Mr. Boyd: Your Honor please, to save time we will stipulate that the entire statement may be introduced into evidence at this time. No objection to any parts being separated.

The Court: All right. Is that satisfactory?

Mr. Heafey: I will tell you the rest of the statement has to do with the facts of the accident, not material here. The only part we wanted was the part concerning whether or not he had permission to drive the car from the named insured.

Mr. Boyd: I think, your Honor, it is purely hearsay. We will let the whole thing go in for what it may be worth, but for any parts we object on the ground it is hearsay. We don't know what was asked by the adjustor that took it.

Mr. Heafey: Goes to the notice of the company.

The Court: At any rate, I understand they already consented for the whole thing to go in.

Mr. Heafey: That is correct. I will read the statement to the jury.

"November 7, 1947. Statement of Duane Richard Claggett, Age 20, 1106 Maine Avenue, Richmond, California:

"I am presently unemployed, was last employed by J. T. Thorpe, Brick Contractor, on a job at the Associated Oil company Refinery at Avon, California. I am single, reside with my uncle, Carl G. Claggett. [60] My parents reside at Mora, Minnesota.

(Testimony of William R. Hunt.)

“On October 31, 1947, I borrowed Mrs. Wilbur Malin’s 1936 Ford Coach, Nebraska license 2-8671, and was driving it in an easterly direction along Access Highway when I struck a pedestrian. I had borrowed the car from Mrs. Malin to take a girl acquaintance to a dance in Oakland. I was alone in the car when the accident happened.

“The accident happened at approximately 8:00 p.m. at the intersection of 47th Street and Access Highway. I was eastbound in the southernmost of the eastbound lanes. The pedestrian was crossing Access Highway from north to south in the cross-walk at the east side of the intersection. When I first saw the pedestrian he was standing almost precisely on the double white strip dividing east and westbound traffic. I am not certain whether he was within the boundary of the cross-walk. My car was then approximately 75 feet west of the cross-walk. An instance after I saw the pedestrian in the middle of the highway, not believing that he had observed my approach, I sounded my horn to warn him. The pedestrian continued along his course and I removed my foot from the accelerator pedal. I thought there would be time for me to pass in front of the pedestrian before he entered the southernmost lane and I did not, therefore, [60] apply my brakes until an instant later when he apparently heard my horn, turned to look in my direction, apparently misjudged my speed and commenced to run. As the car was then not more than

(Testimony of William R. Hunt.)

30 feet from the pedestrian it was too late to swerve into the middle lane for southbound traffic so I swerved to the right and slammed on my brakes. My car then commenced to skid, partly on and partly off the highway, struck the pedestrian and carried him up the highway for a distance later determined by the police to have been 90 feet. The point of impact was approximately 10 feet east of the cross-walk and the pedestrian must have been at the very edge of the pavement when he was struck because I had one wheel on and one wheel off the highway at the moment of impact and the point of contact on the car was the middle of the front grill.

“When my right wheels passed onto the gravel at the edge of the highway the car began to slide counter-clockwise in an arc and came to rest facing in a general northwesterly direction partly in each of the two eastbound lanes. The pedestrian’s body was lying at the edge of the pavement approximately two or three feet closer to the cross-walk than the front of my car. I immediately drove the car off the highway and parked it.

“I have read the foregoing statement and it is, to the best of my knowledge, true and correct. Signed Duane R. Claggett.” [60-a]

Q. (By Mr. Heafey): Now, I will ask you, Mr. Hunt, whether or not you have any statement in your file that was ever taken from Mrs. Wilbur Mehlin up to the present time?

(Testimony of William R. Hunt.)

A. There was none that I know of.

Q. And when was the first time that you notified the insurance company under your policy—Wilbur Mehlin, that an accident had occurred and a claim had been made?

A. The first time I notified him?

Q. Yes. Does your file——

A. I don't recall we notified him until after suit was filed and we sent him a customary suit letter.

Q. What was the date of that letter? First of all, what was the date the suit was filed, when did you get notice of the pendency of the action?

A. Well, we sent the file and forms of complaint to Dana, Bledsoe & Smith's office in February, February 6, so we were notified at that time, possibly two or three days before.

Q. Well, the action had been filed some time in December, had it not?

A. Yes, it had been filed, but apparently service hadn't been made. We didn't receive it until later.

Q. You referred the file to Dana, Bledsoe & Smith on February 5th? A. February 6th.

Q. Of 1948? [60-b]

A. Of 1948, that's right.

Q. Now, will you refer to your file as to when you notified the insured with your form excess letter?

A. That should follow at the same time. I don't see it in here. I recall now—you see, this is a

(Testimony of William R. Hunt.)

Nebraska policy and of course we didn't have the master file here, and I recall that we communicated with Mr. Gibson with reference to notifying the policy holder and I am not sure, but I think they notified him back there.

Mr. Boyd: Just a second, Mr. Heafey. Your Honor please, I will ask that be stricken that it could or might be or something else.

The Court: The statement "I am not sure but I think" should go out and the jury will disregard it.

Q. (By Mr. Heafey): Who was Mr. Gibson?

A. Mr. Gibson is superintendent of claims for Nebraska; W. W. Gibson.

Q. And was a report made to that office that an accident occurred involving a policy holder from Nebraska?

A. We immediately notified and we made and requested coverage immediately.

Q. Confirmation of coverage? A. Yes.

Q. Will you look now and see if you can find any notification you may have sent from here to the assured? It should be marked, [61] we went over those this morning.

A. That is what I thought.

Q. Maybe some place in the yellow paper, yellow slips that went in there.

A. Here it is. Notified Melvin Mehlin on April 15, 1948, that we had forwarded the file to Dana, Bledsoe & Smith.

(Testimony of William R. Hunt.)

Q. Is that a customary form letter that goes with—— A. Yes.

Q. Amount prayed for is in excess of the policy limit?

A. The last paragraph states that the amount claimed is in excess and afforded by his protection and notified him if he wished to employ an attorney of his own it was perfectly all right for him to do so.

Q. And the date of the letter was April——

A. April 15, 1948, sent by registered mail.

Q. Was that sent from the Berkeley office or from the Nebraska office?

A. No, this was sent from the Berkeley office, signed by Mr. Meyers, carbon copy was sent to superintendent Gibson at Lincoln, Nebraska.

Mr. Heafey: Your Honor, I think we can save a little time if we take a recess at this time and I can have the documents ready for his reference after the noon recess.

The Court: All right, we will take a recess at this time. Ladies and gentlemen, this Court will have to adjourn at 3:30 [62] this afternoon on account of another engagement which I have to keep, so we will meet at 1:30 unless that is not agreeable to any of the jurors. We will meet at 1:30 today instead of 2:00 o'clock and adjourn at 3:30.

Bear in mind, ladies and gentlemen, the admonition I have heretofore given you.

(Thereupon an adjournment was taken until 1:30 p.m. this date.) [62-a]

Thursday, January 5, 1950, 1:30 P.M.

WILLIAM R. HUNT

resumed the stand.

Direct Examination
(Continued)

By Mr. Heafey:

Q. Mr. Hunt, when was it the State Farm received notice for the first time that this automobile had been taken out of the state of Nebraska without the permission of the named insured?

Mr. Boyd: Well now, if your Honor please, we object to that question, particularly the form of it. There is no evidence in this case so far it hadn't been taken out with the permission of the named insured. As a matter of fact, we think it had been what was reported out here, that has been asked and answered, received notice that the accident, immediately afterward, or two or three days after the accident.

The Court: I can't agree with you there. The testimony read from the depositions this morning proved, tended to prove, I should say, Mr. Mehlin didn't know it had been taken out and that his wife took it way without notifying him, so I think that I will have to overrule that objection.

Mr. Castro: May we have an objection on the further grounds it calls for the opinion and conclusion of the witness and not for a fact.

The Court: Well, you can reframe the question as to whether received any notice. [63]

(Testimony of William R. Hunt.)

Q. (By Mr. Heafey): Mr. Hunt, did the State Farm Mutual receive any notice at any time up until the present time to the effect that the automobile that was insured under your policy had been taken out of the state of Nebraska without the permission of the named insured?

A. Yes, first notified to that effect the early part of July.

Q. And who notified you at that time?

A. Attorney Leighton Bledsoe.

Q. One of your attorneys?

A. Phoned me and told me what he had found out from the attorney in Lincoln, Nebraska.

Mr. Boyd: Your Honor, I object to what the attorney found out from another attorney; not admissible.

The Court: I will strike that out, "He found out."

Q. (By Mr. Heafey): So that it was some time in July of 1948, the early part of July, 1948, that you first had notice to the effect that the automobile had been taken out of the state of Nebraska without the permission of the named insured?

Mr. Boyd: May we have him specify the first time this particular witness had notice, your Honor, whether he had knowledge of what went on in Nebraska?

Mr. Heafey: Well, I will get to that next.

The Court: I think——

The Witness: Received the phone call from Mr. Bledsoe on July 8. [64]

(Testimony of William R. Hunt.)

Q. And that was when you were notified?

A. That is right.

Q. To the effect that he had heard it had been taken out of the state of Nebraska without the permission of the named insured?

A. And unlawfully out of the state of Nebraska, too.

Mr. Boyd: Your Honor please, I think that that last should go out as a voluntary statement of the witness, purely a legal conclusion as to whether or not it was unlawful. As a matter of fact, the charge was dismissed.

The Court: I think that is true.

Mr. Heafey: We have no objection.

The Court: The words from "unlawful" will be stricken out; disregard them.

Q. (By Mr. Heafey): Now, after receiving that notice, Mr. Hunt, what action, if any, did your company take?

A. We sent a teletype message to our office in St. Paul asking them to thoroughly investigate and to obtain a non-waiver agreement from the insured.

Q. Will you state whether or not a non-waiver agreement was subsequently obtained?

A. Yes, it was.

Q. From whom was that obtained?

A. It was obtained from Duane R. Claggett.

Q. What was the date of that non-waiver agreement? [65]

A. The next day, July 9.

Q. Where was that non-waiver agreement taken from Claggett, in what state?

(Testimony of William R. Hunt.)

A. In Nebraska.

Q. And the date of it is July 9, 1948?

A. That is correct.

Q. Will you kindly read the wording of that non-waiver agreement?

Mr. Boyd: If your Honor please, I would like to see the non-waiver agreement.

Mr. Heafey: It is a regular form. Can you take it out of the file?

Mr. Boyd: Your Honor please, we want to object to the introduction of the contents of that memorandum in evidence. It is purely hearsay, no foundation laid as to the taking of the agreement, and it is just full of legal conclusions, not only opinions of the State Farm Mutual but legal conclusions as to what their rights have been, as to what they say is not the test in this case as to what the law is.

Mr. Heafey: I think under the estoppel charge in our complaint, your Honor, we are entitled to show what action the company took with reference to obtaining a non-waiver agreement before defending this action.

Mr. Boyd: Absolutely no foundation laid, as to who signed it, who was there, what was said. [66]

The Court: Well, I don't think that is of any particular consequence, because here in a sense you are claiming Claggett's rights under the policy.

Mr. Boyd: That is correct, your Honor.

The Court: And therefore it is admissible in con-

(Testimony of William R. Hunt.)

nection with their denial, if there is any denial.

Mr. Castro: There is no evidence of Claggett's signature.

The Court: No foundation laid in that respect.

Q. (By Mr. Heafey): Are you acquainted with Mr. Claggett's signature?

A. No, I think not. Mr. Dennis might be.

Q. Was Mr. Dennis the one who took the statement from him? A. You mean——

Q. The statement that we have in evidence here this morning, got in evidence?

A. No, he took the statement of Mrs. Mehlin. Mr. Mehlin's statement was taken in Nebraska.

Q. I am referring now to the statement that was read in evidence this morning taken from Duane Claggett right after the accident occurred. Was that taken by Mr. Dennis?

A. That's right, it was taken by Mr. Dennis.

Q. All right.

Mr. Heafey: I will introduce this when Mr. Dennis testifies, your Honor. [67]

Q. Now, after you had received notice to the effect that this car had been taken out of the state of Nebraska without the permission of the named insured, did you subsequently obtain statements from the named insured and his wife?

A. Yes, we did.

Q. And when were those statements taken?

A. August 25, 1948.

Q. And where were those statements taken?

(Testimony of William R. Hunt.)

A. They were taken back in Nebraska.

Q. And by whom were they taken?

A. They were taken by our attorneys back there, I presume.

Q. What is his name, who asked the questions? You can tell by who asked the questions, the name of the person.

A. Direct examination by Mr. Healey.

Q. And is Mr. Healey of the law firm that took the statement for you in Lincoln, Nebraska?

A. Yes, I'm sure that is correct.

Q. Can I see that, please? Now, Mr. Hunt, are these the first statements that were taken from either Mr. or Mrs. Mehlin with reference to the facts surrounding the taking of this automobile out of the state of Nebraska? A. That is correct.

Mr. Boyd: Objected to as calling for a conclusion of the witness, your Honor, not for a fact.

The Court: If he knows. [68]

Q. (By Mr. Heafey): From an examination of your file and from your knowledge of the matter thereof, these are the first statements that were taken concerning those matters?

A. That is absolutely correct, yes.

Mr. Heafey: I am going to offer these statements in evidence.

Mr. Boyd: Your Honor please, these statements, according to the admission of the witness, were taken in August, 1948, after the case had been in their hands for a period of ten months after they had offered settlement, after they had——

(Testimony of William R. Hunt.)

Mr. Heafey: Objecting?

Mr. Boyd: Those are the grounds of my objection, purely hearsay, not binding on this plaintiff under the doctrine of estoppel.

The Court: I don't think they are, either, but the legal effect of those statements I assume is to the same effect as the testimony of Mr. and Mrs. Mehlin.

Mr. Heafey: Exactly, your Honor.

The Court: And is the only purpose of introducing those statements, would be to show that was the first time that the insurance company found out.

Mr. Heafey: Precisely.

The Court: Tending to prove that they hadn't had any permissive use of this automobile, so I think the entire—I wouldn't want to allow those statements in evidence, but I think [69] the witness could be asked if, so far as his part of the company is concerned, whether that was the first notice that they had.

Q. (By Mr. Heafey): Mr. Hunt, after these statements were taken from Mr. and Mrs. Mehlin in Lincoln, Nebraska, on the 25th day of August, 1948, and were referred out here to your office, was that the first information you had of the details concerning the taking of this automobile out of the state of Nebraska? A. That's right.

Q. Prior to that time I believe you testified that in the early part of July, or on July 6 or 7, that Mr. Bledsoe had informed you to the effect that he had heard it had been taken out?

(Testimony of William R. Hunt.)

A. That's right.

Q. And was it after that you had these statements taken?

A. We didn't take a statement from the assured previous to that time, because he wasn't in the car and knew nothing about the accident.

Mr. Boyd: I move to strike that as self-serving.

The Witness: We presumed there was permission.

Mr. Boyd: Just a moment, that is non-responsive.

The Court: Yes, it is a voluntary statement, will be stricken, and the jury instructed to disregard it.

Q. (By Mr. Heafey): Mr. Hunt, will you refer to your file, please, and tell the jury just what coverage came under the policy in this matter? [70]

Mr. Boyd: Calls for an opinion and conclusion of the witness, the very point at issue in this case, if your Honor please.

Mr. Heafey: No, I want——

The Witness: I have a copy of that and the coverage——

Mr. Heafey: I wanted to inquire as to whether or not there was collision insurance here. We want to show what the coverage was on this particular car.

The Court: Wouldn't that be in the policy?

Mr. Boyd: The policy is not in evidence.

The Court: The policy is in evidence, unless there is some supplemental agreement.

Q. (By Mr. Heafey): Mr. Hunt, can you tell

(Testimony of William R. Hunt.)

from looking at the policy?

A. Is this the original, Mr. Mehlin's copy?

Q. This is a certified copy of the original. Can you tell from examining that as to whether or not there was any collision insurance on that automobile?

A. No, sir, there wasn't. No collision coverage.

Q. All right. Are you acquainted with a Mr. Gripenstraw?

A. Yes, I am.

Q. What is his full name?

A. Louis Gripenstraw.

Q. Is he employed by the State Farm Mutual?

A. Yes. [71]

Q. In what capacity?

A. Traveling adjustor.

Q. Does he work under you out of the Berkeley office?

A. That is correct.

Q. And what are his duties as an adjustor?

A. To investigate accidents, take statements, obtain the evidence and to negotiate settlements if the facts prove it is a case up to, up to a certain amount. His authority is limited.

Q. What is the limit of his authority?

A. \$3,000.

Q. Is that the limit of all adjustor authorities?

A. That's right.

Q. Does he or any adjustor working out of your office have any authority to waive any provisions of a policy?

Mr. Boyd: Your Honor please, that is a ques-

(Testimony of William R. Hunt.)

tion, I think, is purely a question of legal conclusion.

The Court: I think so.

Mr. Heafey: I will withdraw the question.

The Court: Sustained.

Q. Are you acquainted with a Mr. Dennis?

A. Yes.

Q. Does he work out of your office?

A. Yes, he does.

Q. What is his full name?

A. John Dennis.

Q. And in what capacity does he work in your office? [72]

A. The same capacity as Mr. Gripenstraw, traveling adjustor.

Q. And has the same authority as Mr. Gripenstraw? A. Exactly the same, yes.

Mr. Heafey: You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Hunt, how long have you been adjusting claims, sir?

A. Well, I worked as an outside adjustor for several years. I have been with the State Farm for sixteen and a half years.

Q. I take it then that you are entirely familiar with the claim adjusting business, are you, sir?

A. Well, I should be.

Q. I think so. You know, do you not, Mr. Hunt,

(Testimony of William R. Hunt.)

that the first question that any claim adjustor ever determines when a loss is reported is whether or not the policy covers the accident; is that not true, sir?

A. Well, just what do you mean? You're speaking about coverage or not. Yes, I should never investigate a case until I find out his coverage, verify that, that is right.

Q. And the first thing that happened in this case right here when this accident report came in was that you verified the coverage, did you not, sir?

A. We verified the fact the car was insured for Mr. Mehlin, yes.

Q. Well, didn't you know the day this accident was reported Mr. Wilbur Mehlin was a resident of Lincoln, Nebraska? [73]

A. We knew it after we had wired for coverage, yes.

Q. That was in November of 1947, was it not?

A. November 3, that is right.

Q. And you knew that when Mrs. Mehlin came in your office to report that accident that she was residing in Richmond, California, did you not, sir?

A. Yes.

Q. And you knew that when you sent your adjustor out to take the statement from Mr. Claggett that he had obtained the permission to use the automobile from Mrs. Mehlin, did you not, sir?

A. Yes, we knew that he had her permission. We never questioned that.

(Testimony of William R. Hunt.)

Q. You didn't question the coverage at all, did you?

A. Not at that time. We had no reason to because Mrs. Mehlin said she was the wife out here for a visit and we assumed that being the wife she had his permission. We didn't question it.

Q. And as a matter of fact, you were so certain that Mr. Claggett was covered under your policy that you authorized your adjustor to come over and offer Mr. Castro \$7500, didn't you?

A. At the time we started to settle it, we assumed she was driving the car with the policy holder's consent, that he was driving it with her consent. I will answer that by saying——

Q. That question should be answered yes or no, and then explain it. [74]

The Court: Answer it yes or no, if you can, and then explain it.

A. Yes, at that time we thought he was covered, yes.

Q. (By Mr. Boyd): And never even questioned the coverage sufficient to request your Lincoln, Nebraska, office to check with your named insured, did you?

A. No, we didn't check at that time because we assumed that the information we had gotten from Mrs. Mehlin was correct.

Q. The information that you had from Mrs. Mehlin was merely to the effect that Mr. Claggett was driving with her permission?

(Testimony of William R. Hunt.)

A. She didn't——

Q. Is that the information?

A. She told us she had given him permission to drive the car, that is right.

Q. That is all the information you had when you authorized your adjustor to authorize \$7500?

A. That is all she gave us. She never, when Mr. Dennis questioned her, she never gave us the true facts.

Mr. Boyd: I will ask that go out, if your Honor please, as to what Mr. Dennis said and something else.

The Court: Yes, I think I will strike that out.

Q. (By Mr. Boyd): Isn't it a fact, Mr. Hunt, that at the time you authorized your adjustor to offer \$7500, the only information that you had had or requested from Mrs. Mehlin was whether or not she had authorized Mr. Claggett to drive [75] that car?

A. That's correct, yes.

Q. Yes. Now, after this suit was filed, Mr. Claggett came into your office, did he not, with a summons and complaint?

A. I don't know how the summons and complaint got in there; I couldn't say.

Q. Doesn't your file show how it came in there?

A. It might; I don't know. I didn't notice whether it came in or was brought in or given to an agent. They come in many ways.

Q. And would you look at the file and tell how the summons and complaint came into your office?

(Testimony of William R. Hunt.)

A. We don't keep a record of that, as a rule. All we are interested in knowing is when the service was made. Who brings it in, that is immaterial.

Q. You don't know how this summons and complaint was brought into your office? A. No.

Q. Do you know what date it came into your office?

A. We have summons and complaint come in quite often through the mails, sometimes brought in by an agent. We don't pay much attention how they——

Q. I imagine they do, but does your file show how this summons and complaint came into your office?

A. I wouldn't know without taking an hour to go through it.

Q. You have been through your file before you testified, or [76] haven't you, Mr. Hunt?

A. If you want to take time off to look through——

Q. Didn't you go through the file this morning before you testified?

A. Yes, I went through it. In fact, on my way over here in the car.

Q. Didn't you go through it again at noon?

A. No, I just had a discussion with Mr. Leighton, I didn't go through the file at noon, no.

Q. What date was the summons and complaint served on Mr. Claggett?

A. I haven't the slightest idea.

(Testimony of William R. Hunt.)

Q. Does your file show that?

A. I wouldn't know; it might.

Q. Can you look and tell us the date that it was served, sir?

Mr. Bledsoe: I have it here, if you want it. I have the summons. You want a stipulation on it, counsel?

Mr. Boyd: I would like to know what the file shows.

Mr. Bledsoe: My file has it.

Mr. Boyd: You have the——?

Mr. Bledsoe: Yes.

The Witness: I don't have the original complaint here, anyway.

Mr. Bledsoe: Served 12/27/47.

Mr. Boyd: December 27, 1947, according to your attorney, [77] Mr. Hunt.

Mr. Bledsoe: That is probably correct.

The Witness: I wouldn't know.

Q. (By Mr. Boyd): And did you, or anyone in your office, have any conversation with Mr. Claggett after the summons and complaint were filed?

A. I doubt it, because we had his statement, we already had his statement, and the file was referred to Mr. Leighton's office and any further conversation with Mr. Claggett would be had by Mr. Bledsoe.

Q. When was the file referred to Mr. Bledsoe?

A. That date is in here some place. April 15, 1948, apparently.

Q. Was referred to Mr. Bledsoe——

(Testimony of William R. Hunt.)

A. No, that is the date we—no, it was before that.

Mr. Boyd: Do you have that date, counsel?

Mr. Heafey: A letter of transmittal here some place. February 6.

Mr. Boyd: February 6.

Q. Did you or any of your adjustors have any communications or conferences with Mr. Claggett between the time that the summons and complaint was served in December of 1947 until you referred it to Mr. Bledsoe in February of 1948?

A. I don't think so. I wouldn't know of any if we did.

Q. Well, as a usual manner in the handling of claims, when a customer is sued for several thousand dollars, don't you usually [78] talk to the man that has been sued?

A. Well, we had his statement and it was referred to our attorney's office and they take care of it from there on.

Q. Isn't it customary for the adjustor himself to tell the insured who has been sued that a certain attorney will defend them, or what do you do about that?

A. We don't tell them in person, we notify them by mail, which we did in this case.

Q. Fine. Now, when did you notify Mr. Claggett by mail acknowledging receipt of the summons and complaint and telling him what to do?

(Testimony of William R. Hunt.)

A. We notified our assured on April—I gave you that date a minute ago.

Q. That is correct. A. April 15, wasn't it?

Q. Yes. When did you notify Mr. Claggett, the man that was served with summons and complaint, as of what date?

A. Mr. Claggett is not the named insured, not duty bound to notify him.

Mr. Boyd: I ask that go out, whether duty bound or not.

The Witness: Notified our assured on April 15, 1948, sent a carbon copy to our attorney and to our Nebraska office.

Q. Well, Mr. Hunt,—

A. But we didn't notify Mr. Claggett as far as I know, because he is not insured with us. [79]

Q. Well, Mr. Hunt, when a man who is sued and brings a complaint into your office for something of approximately \$100,000, is it your testimony that you don't even acknowledge receipt of the summons and complaint, or confer with him, or anything?

A. The policy holder—

Mr. Heafey: That is objected to as assuming something not in evidence, the fact that Mr. Claggett brought this complaint into them.

The Court: I think it is a little bit argumentative.

Mr. Boyd: Let me reframe the question.

Q. Did you ever have any communication of any kind with Mr. Claggett after this summons and

(Testimony of William R. Hunt.)

complaint was served some time in December, 1947, up until July?

A. I didn't; I don't think anyone in our office did, but I presume our attorney's office did.

Q. You have the file there. Does your file refer to any copies of letters sent to Mr. Claggett?

A. None, I don't think there are any in here to Mr. Claggett.

Q. Is that your complete file, Mr. —?

A. Yes.

Q. You notified Mr. Mehlin that the suit was for an amount exceeding his policy limits, did you not?

A. Yes.

Q. And is it your testimony you didn't notify Mr. Claggett, the only man who had been served, that the amount of the suit was [80] for an amount exceeding your policy limit?

A. That is not material. We don't insure——

Mr. Boyd: I will ask that be stricken and the witness directed to answer the question.

The Court: The previous answer may go out. Read the question.

(Question read by the reporter.)

A. In case of litigation we notify our policy holder only.

Mr. Boyd: Your Honor please, may I have a direct answer to that question?

The Court: Answer directly. Is it your testimony you didn't notify Mr. Claggett?

The Witness: No, I am sure we didn't.

(Testimony of William R. Hunt.)

Q. (By Mr. Boyd): May I see your file, please? And did you at any time notify Mrs. Mehlin that an action had been filed naming Mrs. Mehlin as a defendant for an amount exceeding her policy limit?

A. Not to my knowledge.

Q. The only one that you notified was Mr. Mehlin? A. That's right.

Q. Now, Mr. Hunt, at the time that you first contacted Mr. Claggett, there was no doubt in your mind at that time but that he was operating the car with Mrs. Mehlin's permission, is that true?

A. That is right, with her permission; that is right. [81]

A. And there was no doubt in your mind at that time that the policy covered Mr. Claggett, was there?

A. As far as we knew at that time, that is correct.

Q. And during the time that you were negotiating with Mr. Castro through your adjustor, there was no doubt in your mind but that the policy covered Mr. Claggett, was there?

A. No, I don't think we would have had negotiations if there was any doubt in our minds.

Q. If Mr. Gripenstraw stated to Mr. Castro that the automobile was being operated with the permission of the owner at the time that he was negotiating, that would have been with your full approval, would it not, sir?

A. I am sure Mr. Gripenstraw didn't make that statement.

(Testimony of William R. Hunt.)

Q. If he had made that statement you certainly would have had no objection to it?

A. I could have objected; I wouldn't be bound by his statements.

Q. If you had been asked the question by Mr. Castro as to whether there was any question as to the permissive use of the automobile, you would have told him there was no question?

A. At that time I would have assumed that coverage was all right at that time, yes.

Q. So if Mr. Gripenstraw did make that statement, why, you would have had no objection to him making it?

Mr. Heafey: That is objected to as incompetent, irrelevant and immaterial, whether or not he objected to it. [82]

The Court: Yes, I think so.

Q. (By Mr. Boyd): Now, Mr. Hunt, you obtained the facts from Mr. Claggett as to how this accident occurred, did you not?

A. Mr. Dennis did, yes.

Q. And that was reported to you?

A. That is right.

Q. And you knew that the deceased had been struck in a crosswalk and knocked some 90 feet, is that correct?

A. I am not very familiar with the facts now. I don't remember for sure just what——

Mr. Heafey: The statement doesn't indicate that, counsel.

(Testimony of William R. Hunt.)

Q. (By Mr. Boyd): The statement has been read in evidence, but you went over the file and knew what the facts were, did you not?

A. Yes, Mr. Meyers did at the time. I didn't go over the file when it first came in.

Q. Mr. Hunt, as I understood you to say, the company offered \$7500 in settlement, is that correct? A. That is correct.

Q. And how did you determine the value of that case as \$7500?

A. Well, we didn't feel it was a hopeless case, felt there was some defense, contributory negligence, but it was a death case. Where that element is involved, thought it better to settle.

Q. Was there any question in your mind but that the plaintiff's damages far exceeded your policy limit of \$10,000? [83]

A. It was a case of liability, if our man was entirely at fault and no negligence on the part of the deceased, it was a case that would far exceed our limits.

Q. And isn't it a fact, Mr. Hunt, that the only reason that you withheld your offer to \$7500 was the fact that you knew that the plaintiff couldn't get more than \$10,000 because of your policy limit?

A. No, if we had felt it was a clear case of liability we would have offered more than \$7500 on a ten limit. We felt there was some defense in it. This man was running across the street, wasn't looking out for his safety. Apparently from our

(Testimony of William R. Hunt.)

investigation we felt that it was about a 50-50 case. We felt we had 50-50 to win.

Q. What is your limit of authority?

A. My limit is the same. No one in my company has any authority over \$3000.

Q. I beg your pardon?

A. No one in my company has any authority to settle a case over \$3000. If you want authority above that you have to get it from the claims committee, which is composed of five men who meet four times a week and they place the value on the claims.

Q. And was this case submitted to your claims committee?

A. Oh, yes, all claims over that amount have to go to the committee.

Q. That was back in Bloomington, Illinois? [84]

A. No, we have our own committee here in Berkeley.

Q. And your claims committee authorized the offer of \$7500? A. That's correct.

Q. What reserve were you carrying on this case, Mr. Hunt?

A. Our reserves are always much higher than what we ever expect to pay on them because our reserves have to include adjusting expense, attorney's fees, and all the other expenses which are included beside any possible settlement, so we usually carry a reserve of at least one third more than what we think the claim is worth. In other words, for a

(Testimony of William R. Hunt.)

claim we think we might settle for seven, we put \$10,000 on it.

Q. But in this particular case you carried a damage reserve of \$10,000, did you not?

A. Practically all death cases are opened up with a maximum reserve.

Q. And that is the reserve that you carried in this case?

A. I haven't got the outside file, I will have to see it.

Mr. Castro: I have clipped the pages, Mr. Hunt.

Q. (By Mr. Boyd): The page is clipped there; will you take a look at it, please?

A. Yes, we were carrying ten.

Q. And during the months of November, December of 1947, January, February, March, April, May and June of 1948, you never questioned the company's coverage for Mr. Claggett, did you?

A. We didn't question the coverage until we found out the truth [85] of the situation from Nebraska.

Q. And you never made any effort to contact your named insured, Wilbur Mehlin, during those same months, did you?

A. Well now, you see our Nebraska office was notified immediately, and received a copy of the file; they received copies of everything as they came into us, and they had a complete file of all those. It is very possible our Nebraska office contacted

(Testimony of William R. Hunt.)

him, it would be up to them to do it. They have the master file.

Q. In other words, it is the duty of the company of the office where the named insured lives, where the policy is written? A. That is right.

Q. To contact the company?

A. That is right.

Q. The insured?

A. Any need for contact they should make it there.

Q. So regardless of whether they did or did not contact the insured, so far as you know the Nebraska office never questioned the coverage of this case until July of 1948, is that correct?

A. They probably didn't; I am sure they would have notified us.

Q. Any question in their mind, they would have immediately contacted you?

A. Yes, I think they would.

Q. And if there had been any question in your mind about the coverage, you would immediately have contacted their office, [86] would you not, sir?

A. Yes, we would.

Mr. Boyd: Now, I have no more questions at this time. I would like to have an opportunity to take a look at that file. I think counsel has some additional witnesses, if the witness may be excused for the time being.

The Court: Unless there is some redirect.

(Testimony of William R. Hunt.)

Redirect Examination

By Mr. Heafey:

Q. Mr. Hunt, when are reserves set up on these claims, when they come in?

A. Set reserves up immediately. On this particular file we set up \$1500 when we first opened the file.

Q. I see.

A. We have to set up a reserve immediately. It is adjusted later on after we obtain all the information.

Q. Now, if the Nebraska office of the company interviews witnesses and takes statements, do they forward copies of the original statements out here if the action is pending out here?

A. If the action is pending out here they would forward the originals.

Q. Is there anything in the file that indicates that the Nebraska office at any time up until this deposition was taken had contacted either Mr. or Mrs. Mehlin?

A. There is nothing in our file that would indicate it.

Mr. Heafey: That is all. [87]

Recross-Examination

By Mr. Boyd:

Q. You're still carrying \$10,000 reserve on this case, are you not?

(Testimony of William R. Hunt.)

Mr. Heafey: That is objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: Sustain that objection.

Mr. Boyd: That is all at this time.

Mr. Heafey: Mr. Dennis.

JOHN DENNIS

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. John Dennis.

Direct Examination

By Mr. Heafey:

Q. Mr. Dennis, what is your business or occupation? A. Claim adjustor.

Q. For what company?

A. State Farm Mutual.

Q. And for how long a period have you been employed by this company?

A. Just a little under four years.

Q. Were you employed by that company on the 31st day of October, 1947? [88] A. Yes, sir.

Q. And continuously thereafter?

A. Yes, sir.

Q. Is that right? Now, in what capacity were you employed by them?

A. As a claim adjustor.

(Testimony of John Dennis.)

Q. And what are your duties as a claim adjustor?

A. Investigation of accidents and compromising of claims.

Q. I will ask you whether or not a file was referred to you for investigation that involved an accident that occurred on the 31st day of October, 1947, on Access Highway near the city of Richmond, in which a person by the name of Mr. Porter was involved and subsequently died?

A. Yes, sir.

Q. And when did that file first come to your attention, do you know?

A. The first week in November, 1947.

Q. And had a proof of loss already been filed by someone before that file was given to you?

A. Yes, sir.

Q. And who had filed that proof of loss, do you know?

A. It was filed by Mrs. Mehlin.

Q. I will show you what purports to be a proof of loss and ask you if you will examine that, please. Was that proof of loss in the file at the time the file was referred to you for investigation? [89]

A. Yes, sir, it was.

Q. Now, did you interview a person by the name of Duane Claggett?

A. Yes, sir.

Q. And did you take a statement from him?

A. Yes, sir.

Q. Was that statement signed by him in your presence?

A. Yes, sir.

Q. I will show you the statement dated Novem-

(Testimony of John Dennis.)

ber 7, 1948, which purports to be signed by Duane R. Claggett. I will ask you if you took that statement; did you take that statement?

A. Yes, sir.

Q. And was that statement signed by Mr. Claggett in your presence? A. Yes, sir.

Q. Is that his signature? A. Yes, it is.

Mr. Heafey: This statement has already been read in evidence, your Honor.

The Court: Yes.

Q. (By Mr. Heafey): I show you a statement taken from—where was this statement taken?

A. Where?

Q. Yes. A. Taken in Richmond. [90]

Q. I mean the address.

A. Taken at 1106 Main Street, I believe.

Q. Main Avenue, Richmond, is that right?

A. That is right.

Q. Now, did you also interview Mrs. Mehlin?

A. Yes, sir.

Q. And when did you have a discussion with her?

A. Well, it was in the first week in November, the day I went there and took the statement from Claggett.

Q. The day you took the statement from Claggett you talked to Mrs. Mehlin?

A. That is right.

Q. Where was she at that time?

A. She was in the apartment at the address on Main Avenue where I talked to Claggett.

(Testimony of John Dennis.)

Q. And will you tell us what the conversation was you had with Mrs. Mehlin at that time?

Mr. Boyd: Your Honor please, we object on the grounds it is hearsay, what anything Mrs. Mehlin may have told this adjustor. Certainly entitled to a right of cross-examination.

Mr. Heafey: Goes to the notice the company had with reference to the facts as to whether or not she told him that she had taken the car from Nebraska with the permission of her husband.

Mr. Boyd: Your Honor please, it is still hearsay. [91]

The Court: May not be, the question of notice. Limiting it just to the matter of notice?

Mr. Heafey: That is right.

The Court: I will allow it.

Q. (By Mr. Heafey): Will you tell us what the conversation was that you had with Mrs. Mehlin on that question?

The Court: With respect to whether or not she told you she had taken the car from Nebraska without her husband's permission.

The Witness: She did not tell me that.

Q. (By Mr. Heafey): What did she tell you in that connection?

A. Told me she was visiting in California; her husband was at home.

Q. And did you ask her how long she was going to remain? Give me the substance and effect of the

(Testimony of John Dennis.)

questions you asked her and the answers she gave you on that occasion.

A. I asked her first where Mr. Mehlin was. I didn't know where he was, didn't know, and she told me he was at home. She was visiting here in California and staying with friends in Richmond. And I asked her how long she intended to be here and she told me she was uncertain how long her visit would be, and I asked her if she would be, if I could locate her at the address in Richmond if it became necessary. She said yes, as long as she remained there. That is the substance of it.

Q. And did she give you a home address, Nebraska address? [92]

A. Indirectly, yes. I asked her if she still lived at that address and she said yes.

Q. Had you referred to this proof of loss in the file at that time? And I will ask you if there was an address on that proof of loss. A. Yes, sir.

Q. And an address for mailing, and what address was that?

A. 210 North 29th Street, Lincoln.

Q. Lincoln what? A. Nebraska.

Q. Now, did you ask her whether or not this car was being driven with her permission by Mr. Claggett? A. Yes, sir.

Q. Did you talk to her before you talked to Claggett? A. Yes, sir.

Q. Was it at the home where you found Mr. Claggett?

(Testimony of John Dennis.)

A. Yes, sir; that is right. He was there, he was in the vicinity. I think he was outside and she called him in.

Q. I see.

You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Dennis, you didn't bother to take a statement from Mrs. Mehlin, is that correct?

A. No.

Q. The only thing you were interested in was in finding out how [93] this accident occurred, is that not true?

A. That was my first concern, yes, sir.

Q. No question in your mind but that the policy covered Mr. Claggett, was there?

A. No, sir.

Mr. Heafey: That is objected to, incompetent, irrelevant and immaterial as to what was in his mind, your Honor.

Mr. Boyd: Whether it was his duty to find out is certainly material, your Honor.

The Court: I think that calls for a conclusion.

Mr. Boyd: I will reframe the question.

Q. You knew that the car was registered in Lincoln, Nebraska? A. Yes, sir.

Q. Mrs. Mehlin told you that her husband wasn't with her? A. Yes.

Q. Mrs. Mehlin told you that she had been out

(Testimony of John Dennis.)

here and was going to stay for an indefinite time?

A. Yes.

Q. And you still didn't even question Mr. Mehlin? A. Question——

Q. Mr. Mehlin.

A. Mr. Mehlin wasn't there. You mean I didn't question her about him?

Q. Yes.

A. I asked her where he was, is that what you mean? [94]

Q. You didn't ask Mrs. Mehlin if she had permission of her husband to take the automobile, did you? A. No, sir.

Q. And why didn't you?

A. I—I don't think the question occurred to me.

Q. In other words, isn't it true, Mr. Dennis, that you just assumed that the wife had permission to use the automobile and give anyone else permission to do it? A. Yes, sir.

Q. You knew that Wilbur Mehlin was the named insured, did you not, on the policy?

A. That is right.

Q. And you knew that Mr. Claggett resided in California, did you not?

A. Temporarily, you mean? Yes.

Q. Did Mr. Claggett ever at any time to your knowledge reside any place else other than California? A. Yes, sir.

Q. Where did he come from?

A. Well, his parents lived in Mora, Minnesota,

(Testimony of John Dennis.)

while he was living at this address in Richmond. At that time I think it was on a temporary basis, too.

Q. I see. Did you ask Mr. Claggett whether he was acquainted with Mr. Mehlin?

A. I knew after I had talked to him that he didn't know. Whether [95] he volunteered the information or elicited on a direct question or not, I don't remember.

Q. I see. So, Mr. Dennis, you knew after you interviewed Mr. Claggett that he didn't even know Mr. Mehlin. That is your testimony, is it not, sir?

A. That is right.

Q. And even though you knew that Mr. Claggett didn't even know Mr. Mehlin you still assumed that this case was covered, didn't you?

A. Well, I don't assume those things to begin with. I mean, I don't have to make an assumption. My position is going out, the contact with Claggett was not to cover whether he knew Mr. Mehlin or whether he had Mr. Mehlin's permission to use the car, and on the face of it there wasn't anything to arouse suspicion that he didn't, so I concerned myself that particular day only with finding out how the accident happened. Does that explain why I didn't ask?

Q. Well, Mr. Dennis, as a claim adjustor it is your duty to determine facts from which either you or your superior can determine whether or not the policy covers the driver of an automobile, is that not true?

A. That is true.

(Testimony of John Dennis.)

Q. And you found out in your investigation immediately after this accident that Mr. Claggett didn't even know Mr. Mehlin, didn't you? [96]

A. That is true.

Q. And you knew Mr. Claggett was residing in California and Mr. Mehlin was residing in Lincoln, Nebraska; you found out that, didn't you?

A. That is true.

Q. And you still didn't even question whether or not the policy covered Mr. Claggett, did you?

A. Well, I knew that it would have been physically impossible for Mr. Claggett to have had Mr. Mehlin's permission and Mr. Mehlin was in Nebraska and Mr. Claggett in California, so obviously he couldn't have asked Mr. Mehlin for his permission and I just didn't ask the question.

Q. I see. So you just didn't raise any question of coverage even though you knew he couldn't have had permission?

A. Not at that time.

Q. At any time did you?

A. Well, we never had another opportunity to talk to Mr. Claggett, as I recall.

Q. Well, whether you had an opportunity to talk to him or not, did you ever?

A. No, none.

Q. Raise the question of coverage even though you knew from the—immediately after the accident occurred, that Mr. Claggett didn't even know Mr. Mehlin and couldn't have gotten his permission?

A. Did I raise any question?

(Testimony of John Dennis.)

Q. Yes.

A. You mean raise the question of coverage in a conversation with Mr. Claggett?

Q. At any time? A. In the office.

Q. With your superior, outside of the office, inside the office, or any time?

A. No, sir, I don't think the question was ever raised until much later in July, 1948.

Q. Until Mr. Bledsoe raised it in July of 1948?

A. That's right.

Q. Now, when Mr. Claggett was served with this summons and complaint for something in the neighborhood of \$100,000, did he talk to you?

A. I don't believe so, but I don't remember.

Q. Did you receive a summons and complaint yourself?

A. It was handled by me and I don't remember whether Claggett brought it to me or whether it was mailed to me or how I did get it, and I'm not sure I talked to Claggett at that time or not, but I don't believe so.

Q. You did talk to Claggett when you took his statement? A. Yes.

Q. At that time did you tell him if he received a summons and complaint to immediately get in touch with you? [98]

A. I would be only guessing, I am not certain, almost certainly I did. If there was a proof of loss in the office you would tell them if they are served to present the summons and complaint.

(Testimony of John Dennis.)

Q. You also tell them not to talk to anyone else except you about the case, do you not?

Mr. Heafey: That is objected to as immaterial.

Mr. Boyd: I think it is very material as to the instructions this witness gave Mr. Claggett as to who covered him under the policy.

The Court: I will allow it on that ground.

Mr. Heafey: You say did you always or did——

The Witness: I told him that.

Q. (By Mr. Boyd): Well——

A. I don't always do it and I don't remember whether I did then or not.

Q. You generally tell them that, don't you?

A. No, I don't know whether I generally do or not. Sometimes you do if you have reason to believe that a man might make damaging admissions which were not true. In any event, in this case I don't believe I did.

Q. You don't recall, but you don't think you told Mr. Claggett not to talk to any attorney representing the plaintiff or anything of that kind?

A. I doubt it, because Mr. Claggett was represented by counsel [99] at the time and if I told him something like that he might have misinterpreted. He either had been charged with a criminal violation or was about to be, and retained counsel there in Richmond and I left the matter up to him what to do.

Q. On the criminal proceedings file, Mr. Dennis?

A. Yes.

(Testimony of John Dennis.)

Q. That was because of the accident itself, was it? A. Yes, it must have been.

Q. Now, did you at any time after you received a summons and complaint have any correspondence with Mr. Claggett?

A. Correspondence in writing?

Q. Correspondence or conversation.

A. I don't think so. I saw him again, of course, at the time this thing was tried between the time I first talked to him during the week or two weeks immediately following the accident, I probably talked to Claggett more than once. In fact, I did talk to him more than once, but from a period of about two weeks after the accident until the time of trial I don't think, because to the best of my recollection Mr. Claggett went back to Minnesota.

Q. At any time, Mr. Dennis, after the accident occurred, did you ever tell Mr. Claggett that you had arranged for the State Farm attorneys to defend Mr. Claggett? A. No, sir.

Q. At no time. Did you ever notify him, or did your company, [100] to your knowledge, that the amount of the suit was in excess of the policy limit that the State Farm Mutual carried on that automobile?

A. As I recall, Mr. Claggett was personally served and had seen the complaint, so I wouldn't have told him that. I am trying to recall whether I did. If he brought the complaint in and I had a chance to talk, I wouldn't have told him that because he was able to read and he would have the

(Testimony of John Dennis.)

complaint in his possession, but it is possible that if he brought the complaint in my office personally to give it to me I might have looked at it and seen that the amount was in excess of the limit and advised him that it was the fact that he didn't get an excess letter would seem to indicate that he did, but I don't remember.

Q. I see. A. I really don't know.

Q. In other words, it is your practice, Mr. Dennis, to either advise the assured or the driver personally that the amount of the suit is in excess of your policy limit and that they are entitled to get their own attorneys at their own expense if they so desire, or write them an excess letter, is that true, to the same effect?

A. Well, I believe that is, but it is something I don't do and couldn't answer because it would be one of the managerial officers who would write the excess letters, I don't write them. As soon as the claim is brought to suit, well, the excess [101] letters are written by the superintendent. He is responsible for advising either the assured or persons claiming protection under the policy that the amounts demanded are in excess of the policy limits.

Q. Is it the practice of the company from your experience to write excess letters to the insured or those claiming under the policy that the amount of damages alleged in the complaint exceed the policy limit?

A. I believe that it is automatic to do that where

(Testimony of John Dennis.)

a named assured, or member of his family is a defendant or has been served. I don't know whether they do it in the case of a person claiming protection who are not named in the policy; I don't know.

Mr. Boyd: That is all, Mr. Dennis.

Redirect Examination

By Mr. Heafey:

Q. Did Mrs. Mehlin ever at any time tell you while talking to her in the early part of November 1947, in the early part of November 1947, that she and her husband had separated and that she had taken the car out of the state of Nebraska without his consent? A. No, sir.

Mr. Boyd: That is objected to on the grounds it is self-serving, leading and suggestive.

The Court: I will allow the answer. Anything further?

Mr. Heafey: That is all. [102]

The Court: We will take a short recess now. During the recess bear in mind the admonition I have heretofore given you.

(Brief recess.)

Mr. Boyd: Your Honor please, I understand Mr. Hunt has asked to leave. I have two or three questions I would like to ask him at this time.

WILLIAM R. HUNT

resumed the stand, previously sworn.

Further Cross-Examination

By Mr. Boyd:

Q. Mr. Hunt, who is the chairman of your claims committee that you referred to, Mr. Carroll Brockhorst?

A. Not always.

Q. He was on January 22, 1948, when this case went to the claims committee.

A. He could have been, I don't know for sure.

Mr. Heafey: May I see that, counsel? I would like to have the court examine this first, your Honor. This, in my opinion, is absolutely immaterial to any of the issues in this case.

The Court: What is the purpose of that?

Mr. Boyd: To corroborate Mr. Castro's testimony, if your Honor please, that they offered \$7500 and indicate might go to \$8500. Is that stipulated?

Mr. Heafey: No question about that. That is stipulated. [103]

The Witness: I admitted that in my testimony.

Mr. Heafey: In the early part of 1947.

The Court: I think that only deals, the letter only deals with the question whether or not they had contributory negligence.

Mr. Boyd: That is correct.

Mr. Heafey: I have no objection to that.

Mr. Boyd: May we read it into evidence, Your Honor?

(Testimony of William R. Hunt)

Ladies and gentlemen, this is a letter dated February 1, 1948, Lincoln, Nebraska, Claim Department, to Mr. W. R. Hunt, Assistant Claims Manager.

“We note the copy of your letter of February 6 to attorneys Dana, Bledsoe & Smith.

“In the report of investigation under paragraph 4, Insured Driver—permission—Agency it is stated Duane Richard Claggett borrowed the car from Mrs. Mehlin the wife of the named insured and he was driving the car with her permission and consent. We did not discover in the file particularly whether Claggett was an agent of our insured or whether he was driving the car for the benefit of our insured or spouse. We do not know of the intricacies of the law of California and therefore do not know whether we want to send the regular excess suit notice letter to our assured, and for that reason believe if the suit letter is to be [104] sent, it should come from you boys who know the law of land in which this accident occurred.

“If you agree with me and do send the suit letter, please forward us a copy.”

Counsel, I would like also to read the excess letter that went out in April. It has been referred to by the witness.

Mr. Heafey: Yes, we have no objection to that.

Mr. Boyd: On April 15, 1948, a letter written by Mr. G. E. Meyers, Claim Superintendent of the State Farm Mutual Auto Insurance Company to

(Testimony of William R. Hunt)

Marvin Mehlin, 210 North 29th Street,, Lincoln, Nebraska.

“We have forwarded the file in connection with the above claim to Dana, Bledsoe & Smith, attorneys, 440 Montgomery Street, San Francisco, California, and have asked that they look after the defense on the lawsuit brought against you by Bertha Lee Porter, Charles Earl Porter and John Richard Porter.

“These attorneys will give the matter all the necessary attention and when they wish you to call at their office with reference to the case, they will notify you. When you hear from them, please comply with all requests they may make.

“As the duly authorized representatives of your insurance carrier, these lawyers are, under the terms of your policy, entitled to your complete cooperation throughout the handling of this litigation, and we would [105] appreciate his having the benefit thereof.

“We note that the amount claimed against you in this suit is in excess of the protection afforded by your policy, and should a judgment in this case exceed the limits of your policy, you would be personally liable for the balance over and above that amount. In view of the possible personal liability, it will be agreeable with this company and its representatives, for you, if you so elect, to procure attorneys of your own choosing at your own expense to represent you personally and appear in this mat-

(Testimony of William R. Hunt)

ter in addition to those we have selected and will recompense.

Yours very truly,"

I have no further questions.

Mr. Heafey: Where is that original letter that you referred to?

Mr. Boyd: February 11, I think. Read that one, too. Stipulate.

Mr. Heafey: There was an answer, your Honor, to that letter of inquiry concerning whether or not Mr. Claggett was acting as an agent of Mrs. Mehlin at the time of the accident and counsel has stipulated that answer may be read in evidence.

This is dated February 24, 1948, and it is from John B. Dennis to W. R. Hunt. Reads as follows:

"Original letters from Paul Dana and W. W. Gibson, and a copy of the Answer are attached. These original papers were inadvertently attached to the duplicate file. Your attention is called to Mr. Gibson's request in his letter of February 11, 1948, to which no reply has been made apparently. At least, no copy is in the duplicate file. I miss the significance of Mr. Gibson's letter but to clarify the status of the driver of the car, Duane Claggett, he was operating the car with Mrs. Mehlin's knowledge and consent. He had borrowed the car to attend a dance in Oakland, strictly a social function and strictly for his own benefit. He was not acting as an agent of the insured nor was he driving the car for Mr. Mehlin's benefit.

(Testimony of William R. Hunt)

“With reference to Mr. Dana’s letter of February 17, 1948, the only copy of the transcript of the Coroner’s Inquest would be in the original file. We have no photographs so far as I know. The only photographs, to which I made reference in my marginal report, were those in the Richmond Police Department file which are not available for our inspection or use.

“We will undertake the additional investigation pertaining to the criminal charges. That is to say, I will telephone Mr. Sugarman and ask him what happened.

“Very truly yours,

“/s/ JOHN B. DENNIS.”

Mr. Heafey: That is all, your Honor.

(Witness excused.)

Mr. Boyd: May we have them until we complete Mr. Gripenstraw, please?

Mr. Heafey: You better wait, he is in San Francisco and these two gentlemen are from Berkeley.

Mr. Gripenstraw, will you take the stand?

LOUIS GRIPENSTRAW

called as a witness on behalf of the defendants, sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Louie Gripenstraw.

(Testimony of Louis Gripenstraw.)

Direct Examination

By Mr. Heafey:

Q. Where do you reside, Mr. Gripenstraw?

A. San Francisco.

Q. What is your business or occupation?

A. Claim adjustor.

Q. For what company?

A. State Farm Mutual.

Q. And for how long have you been employed by that company? A. Since April 1, 1946.

Q. And I will ask you whether or not in the latter part of December of 1947, you had a conversation with Mr. Castro concerning the case of Porter vs. Mehlin? [108] A. Yes, I did.

Q. And had that file been assigned to you for investigation? A. No, it had not.

Q. Did you talk to Mr. Castro in his office?

A. Yes, the offices of Cooley, Crowley & Gaither.

Q. The offices of Cooley, Crowley & Gaither?

A. Yes, sir.

Q. What was your object in going there?

A. My employer, Mr. G. E. Meyers, asked me to contact these attorneys. We had just, apparently a day or two preceding—this summons and complaint had been served, he asked me to contact the firm and protect our time as to filing an answer.

Q. In that connection did you go to their office?

A. Yes, I did.

Q. Did you have a conversation with Mr. Castro concerning that? A. Yes, I did.

(Testimony of Louis Gripenstraw.)

Q. Will you tell me the substance and effect of that conversation, please?

A. I found at this office of Cooley, Crowley & Gaither, Mr. Castro was the attorney which was actually handling this particular file. I had a conversation with Mr. Castro in his office, asked him first if he wanted us to prepare an answer at that time or hold it temporarily on an oral stipulation. He granted us time. He granted us time, I think indefinite. He told us we could make an oral stipulation to have a little [109] time to investigate. I also asked him if he had a demand to make at that time toward a compromise settlement. I believe Mr. Castro replied that he wanted to talk further with his clients, before they made any demand.

Q. And I will ask you if, on that occasion, you stated to Mr. Castro that there was no question of permissive use as far as Mrs. Mehlin was concerned and that she had the permission of the named insured to bring the car here from Nebraska?

A. I don't believe that there was any discussion at all, at least in my presence, in regard to permissive use.

Q. Did you make that statement to him at that time? A. No, I did not.

Q. Was there any discussion at all regarding permissive use? A. Not to my recollection.

Q. Or policy violation? A. No, sir.

Q. Or policy coverage? A. No, sir.

Q. Did he at that time give you a figure to transmit?

(Testimony of Louis Gripenstraw.)

A. Not on the first occasion I talked to Mr. Castro. He told me, as I said, that he wanted first to talk to his clients to determine what they had in mind.

Q. And did you subsequently again see Mr. Castro? A. Yes, I did.

Q. Did you talk to him on the phone or see him in the office? [110]

A. I don't recall which it was the second time. I think it was in his office, but it may have been by telephone.

Q. On that occasion did you have a conversation with him? A. Yes, I did.

Q. And what was that conversation?

A. Apparently Mr. Castro had been discussing the possibility of settlement with our Mr. Hunt. Mr. Castro advised me that they would have to ask our full policy limits as a basis of any settlement. I asked him for an additional stipulation of two weeks, which he granted me, and took that statement as to the full policy limits back to our Mr. Meyers.

Q. Did Mr. Castro at that time mention a figure that had been given to him by anyone, the settlement figure?

A. I believe he mentioned the figure of \$7500. Whether or not that was an offer made to him or a figure that had arisen in another discussion, I don't know.

Q. Did you offer him that amount?

(Testimony of Louis Gripenstraw.)

A. I made no offer.

Q. Did you have any authority on that occasion to make any offer. A. No, sir.

Q. Or on the preceding occasion?

A. No, sir, I had no authority.

Q. And did you, on that occasion or at any time, ever tell Mr. Castro that there was no question concerning permissive use and [111] that Mrs. Mehlin had the permission of the named insured to bring the car here from Nebraska? A. No, sir.

Mr. Heafey: You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Gripenstraw, did you receive a letter with the file or did you work out of the Berkeley office at that time?

A. I cover San Francisco for the company and I always have. We have no claims office here. I go to Berkeley approximately twice each week.

Q. Where did you obtain this file before you talked to Mr. Castro?

A. I didn't obtain the file. Mr. Meyers called me into this office, showed me the summons and complaint. I believe I made penciled notations showing the attorneys' names, plaintiff, the defendant, the defendant had been served papers. I don't recall anything further.

Q. And you knew then at that time that you

(Testimony of Louis Gripenstraw.)

talked to Mr. Castro that Duane Claggett had been served with summons and complaint?

A. I knew that, yes.

Q. You appeared at Mr. Castro's office and asked for a stipulation of time in which to plead on behalf of Duane Claggett, did you not?

A. Not exactly in that way; no, sir. I asked whether or not [112] the plaintiff attorneys wanted us to file an answer immediately or whether he thought it might be something that could be settled and would agree to an extension of time.

Q. And did you obtain an extension of time in behalf of Duane R. Claggett when you talked to Mr. Castro?

A. I obtained a stipulation to extend the time in behalf of the defendant.

Q. Was the defendant that was served at that time Duane R. Claggett, the driver of the automobile?

A. I couldn't say, I don't remember.

Mr. Heafey: We will stipulate it was, counsel.

Mr. Boyd: I want to test this witness' recollection.

Q. Is it your testimony, sir, that you walked into Mr. Castro's office and to ask time for all the defendants that were named in this action?

A. There were several defendants. I asked whether or not he wanted us—he knew that we were the carrier, wanted us to refer this matter immediately to our counsel for an answer, or did he wish to discuss it further.

(Testimony of Louis Gripenstraw.)

Q. Wasn't it the purpose of your trip to San Francisco to obtain time for the defendants?

A. Either obtain time or obtain their attitude that they wanted us to file an answer immediately, in which case we would.

Q. Who did you obtain time for, sir?

A. On behalf of our policy holder. [113]

Q. Who was your policy holder?

A. The named—on our file it is Mehlin.

Q. So it is your testimony you came to Mr. Castro's office and asked for time on behalf of Mr. Mehlin?

A. It would have been, yes.

Q. Even though Mr. Mehlin hadn't been served with summons and complaint?

A. He is mentioned. I wished to protect our policy.

Q. Mr. Meyers didn't tell you who had been served with summons and complaint?

A. That is correct, I had the names.

Q. You had the names? A. Yes, sir.

Q. You knew then Mr. Claggett had been served, didn't you?

A. It wasn't brought up, it was whether he wanted an answer immediately or not.

Q. My question, sir, is: At the time you went to Mr. Castro's office, didn't you know that Mr. Claggett had been served with summons and complaint?

A. As a point of fact I don't know who had been served. My familiarity with the case was very, very slight.

(Testimony of Louis Gripenstraw.)

Q. You didn't know whether anyone had been served?

A. It must have been served or wouldn't have it in our office. Mr. Meyers had told me it was served within the preceding two or three days, I think. [114]

Q. But you did not know who had been served?

A. No, sir.

Q. Is it your custom to go out to plaintiff's attorneys and ask for extensions of time without knowing who or which individual defendant has been served?

A. That would be only a rare occasion, usually only one defendant.

Q. When there are more than one defendant, don't you determine who has been served before you contact an attorney and ask for time in which to plead?

Mr. Heafey: We object to this on the ground it is immaterial.

The Court: I will allow it; it is cross-examination.

A. I can't answer that either yes or no. Normally I would have a great deal more familiarity with the files than in this particular case. This wasn't my file, merely sent across the bay by Mr. Meyers to see whether or not they wished the answer filed or make an extension of time.

Q. Mr. Gripenstraw, you have frequently handled lawsuits in which there are two automobiles

(Testimony of Louis Gripenstraw.)

involved and both drivers have been served, have you not, sir? A. That is correct.

Q. And before you take time in which to plead, don't you determine which policy, which automobile his policy covers? A. Yes, I do. [115]

Q. And you wouldn't certainly have gone into Mr. Castro's office and asked for time in which to plead without knowing who had been served, would you?

A. Apparently did at this time, yes.

Q. In other words, aren't you testifying that you don't recall as to who had been served at the time? A. That is correct.

Q. But whoever had been served, you went over to Mr. Castro and asked him for time in which to plead? A. Yes.

Q. You mean to say, is it your testimony that Mr. Castro didn't ask you what your policy limits were? A. He did ask me that.

Q. He did ask you that, and what did you tell him? A. I told Mr. Castro I did not know.

Q. Didn't you tell him you weren't at liberty to disclose that information?

A. I did not know it, that was my answer.

Q. You didn't know it?

A. That is correct.

Q. Did you ever disclose your policy limit to an attorney representing the plaintiff?

Mr. Heafey: That is objected to as incompetent, irrelevant and immaterial.

(Testimony of Louis Gripenstraw.)

The Court: Yes, I think so. [116]

Mr. Boyd: Let me ask, if your Honor please—I will reframe the question.

Q. Don't you have instructions from your company not to disclose the policy limits of your insurance to any plaintiff or plaintiff's representative?

Mr. Heafey: Objected to on the ground it is immaterial, not proper cross-examination.

Mr. Boyd: Having a connection with Mr. Castro's testimony, your Honor please.

The Court: I have allowed the question.

(Question read by the reporter.)

A. I have no instructions to that effect.

Q. (By Mr. Boyd): Didn't you tell Mr. Castro that you were not at liberty to disclose the policy limit?

A. I don't recall making that statement.

Q. Didn't you tell Mr. Castro that you could say that it was more than \$5000?

A. I don't recall making that. I might explain by way of explanation, I believe I told Mr. Castro that the great bulk of our policies on automobiles are the ten and twenty thousand dollar policies. Mr. Castro said, "I don't believe you write a five and ten thousand policy, to my knowledge." The State Farm does not. Mr. Castro told me at that time that before he could give us any demand he would have to have a certified copy of our policy.

(Testimony of Louis Gripenstraw.)

Q. Didn't you tell Mr. Castro that you could tell him that the policy wasn't more than \$10,000?

A. I did not; I didn't, no.

Q. Do you write policies for more than \$10,000?

A. Yes, the State Farm does.

Q. They do?

A. Yes, sir.

Q. But you didn't say anything to Mr. Castro about the policy not being more than \$10,000?

A. I didn't, no; no, sir.

Q. You may have said something that it was more than \$5000?

A. Yes, sir.

Q. Didn't you also tell him, Mr. Castro, that anything over \$7500 would have to be approved by your Bloomington, Illinois, office?

A. No, sir.

Q. Isn't it a fact that anything over \$7500 has to be approved by that office?

A. Not to my knowledge.

Q. You have the authority to pay the policy?

A. I had the authority to pay \$3000.

Q. \$3000.

A. The claims committee has the authority to pay the full limit.

Q. But at the time you talked to Mr. Castro, the sum of \$7500 was mentioned in some way, was it? [118]

A. Yes, it was, to my remembrance.

Q. You are certain that wasn't Mr. Castro's demand in settlement?

A. No, sir, he wanted the full limit.

(Testimony of Louis Gripenstraw.)

Q. He wanted the full limit of the policy?

A. That is correct.

Q. But he didn't make any figure, name the sum of \$10,000?

A. I don't recall the figure \$10,000 being mentioned.

Q. Did you also say to Mr. Castro on some cases with a \$10,000 policy you paid as much as \$8500 or \$9000 in exceptional cases?

A. I don't recall making any statement to that effect.

Mr. Boyd: That is all.

Mr. Heafey: That is all.

Mr. Bledsoe, will you take the stand?

LEIGHTON M. BLEDSOE

called as a witness on behalf of the defendants, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Leighton M. Bledsoe.

Direct Examination

By Mr. Heafey:

Q. Mr. Bledsoe, you are an attorney-at-law, are you not? A. Yes.

Q. Licensed to practice in the courts of the state of California? [119] A. Yes.

Q. And in the Federal Court? And you are a member of what firm?

(Testimony of Leighton M. Bledsoe.)

A. Dana, Bledsoe & Smith.

Q. And during the year 1948 were you a member of that firm? A. I was.

Q. And where were your offices?

A. 440 Montgomery Street.

Q. Now, during the year 1948 had a file been referred to your office by the State Farm Mutual for defense, a file that was entitled Porter vs. Claggett and Mehlin? A. Yes.

Q. Did that file come to your attention?

A. It did ultimately, yes.

Q. And when did that file first come to your attention? A. July 2, 1948.

Q. And at that time had the case been set for trial? A. It had.

Q. Who had been handling the file in your offices prior to that time?

A. The case was assigned to Mr. Dana.

Q. Does your file indicate when that case was referred to your office by the State Farm Mutual Insurance Company?

A. Well, it came under a letter of transmittal and we have a stamp on that letter dated February 7, 1948.

Q. Now, did you review the file when it was first handed to you? [120]

A. Yes, I took it home on the night of July 2 to review.

Q. At that time had the case been set for trial?

A. Yes.

(Testimony of Leighton M. Bledsoe.)

Q. What was the date for the trial?

A. July 6 or 7, I believe.

Q. And that case was pending in what county?

A. Contra Costa.

Q. Now, what if anything did you do with reference to that file after you had reviewed it?

A. Well, in reviewing it, I noticed a letter had been received from attorneys in Nebraska.

Q. What firm of attorneys was that?

A. Ginsburg and somebody else.

Q. You have that letter there or is it in here?

A. Here it is. Ginsburg & Ginsburg, Lincoln, Nebraska, a letter dated April 19, 1948.

Q. What was the date of that letter?

A. April 19, 1948.

Q. And what information did you receive concerning this matter from that letter?

Mr. Boyd: If your Honor please, I am going to object to the contents of that letter as calling for hearsay. It is something that has been told to an attorney in Lincoln, Nebraska, and in turn communicated by the attorney at Lincoln to this witness. I think it is hearsay; object to it on that ground. [121]

Mr. Heafey: Goes to the proposition of notice to the company, notice to the attorneys for the company, and what action was taken thereafter on the proposition of estoppel.

The Court: We have already had that letter, it was mentioned before, already stipulated there was a letter to the effect—Grinsburg & Ginsburg, was it?

(Testimony of Leighton M. Bledsoe.)

Mr. Heafey: Yes.

The Court: To the effect that this car was taken out of the state without the permission of the assured.

Mr. Heafey: That is the substance and the effect of it.

The Court: All right.

Mr. Heafey: That was stipulated, as to the effect of the letter.

Mr. Boyd: And stipulated in evidence. Your Honor has ruled the letter should not be read into evidence, the contents.

The Court: I don't think so, I will allow that part of it——

Q. (By Mr. Heafey): Mr. Bledsoe, in substance and effect was that what the letter stated?

A. That is correct, yes.

Q. And——

A. There were some other things stated in it. It indicated how the attorneys happened, how Mr. Mehlin happened to have gone to see the attorneys and indicated that he had received that excess letter from the company.

Q. Mr. Mehlin had? [122] A. Yes.

Q. And this was in answer to that telling how the car had been taken from the state of Nebraska, is that correct? A. Yes.

Q. What action, if any, did you take with reference to that file after reading that letter?

A. Well, the next morning was Saturday, July

(Testimony of Leighton M. Bledsoe.)

3, and the insurance company office was closed, and my first knowledge that the case had to go to trial was given to me on the 2nd. I think Mr. Dana up to that time had been trying to get it continued, and either he was going to be away or engaged in a trial and couldn't handle the case, so I was advised on the 2nd of July that we were going to have to go to trial on the 6th or 7th of July and that it was up to me to get it ready for trial, so my first concern was to find out where the driver Claggett was and try to contact him, and so I called the office of the State Farm and found some man there and told him that I wanted to locate Claggett and he was an adjuster over there that didn't know anything about the file, and the man, Mr. Dennis, who was handling it, wasn't there that day, on that particular Saturday, so he simply told me he would leave a message for the adjuster and they would make some effort to locate Claggett.

At the same time, on Saturday morning, I sent a telegram to Claggett at the Richmond address and requested that he call [123] my office, requested that he come into the office on Tuesday, July 6.

Q. What address did you send that telegram to?

A. 1106 Main Avenue, Richmond, California.

Q. Is that the only address you had in the file of Mr. Claggett's?

A. Yes, that is the only idea as to his possible whereabouts. There were some letters that had been addressed to him at that same address back on

(Testimony of Leighton M. Bledsoe.)

March 13, 1948. Mr. Dana had written a letter to him at that address, advising him of the trial date. There was no response to that letter. So, after sending that telegram, I likewise called attorney Crowley at Cooley, Crowley & Gaither's office. I asked for Mr. Castro and was advised he was away for the 4th of July weekend, and Mr. Crowley told me that Mr. Castro was handling it. I told Mr. Crowley that we were trying to get a continuance of the trial because it was Mr. Dana's case. I also told Mr. Crowley that I had learned from looking at the file that there was a possible policy defense involved and that I had been unable to get in contact with Claggett, the driver of the car, to get any additional information from him; that I had reviewed the answer that Mr. Dana had filed and noticed in the answer an admission with reference to permissive use. I told him that we were going to ask to amend that, because from my review of the file and from this letter that had been received from Nebraska I felt that we should make that amendment. [124]

And I told him what the information was that I had received by this letter from Nebraska. Mr. Crowley said that the matter wasn't in his hands for decision, that Mr. Castro would be back on the 6th. I think the trial was at that time set for the 7th of July, the 6th being a Tuesday—Monday was a holiday.

So I prepared papers for a request to amend

(Testimony of Leighton M. Bledsoe.)

the answer and change the pleading in the respects which have been indicated, and I also prepared a reservation of rights agreement which I was going to ask Claggett to sign when he came in on Tuesday, the 6th. And I prepared a motion for a continuance and had an affidavit signed by Mr. Dana and myself with reference to the request for the amendment and the continuance.

Q. That affidavit that was prepared at that time, was that an affidavit to substantiate or support the motion to amend your answer?

A. I believe it was, yes.

Q. And was that affidavit signed by Mr. Dana?

A. Yes.

Mr. Heafey: That affidavit for our motion was read in evidence, your Honor.

The Court: That is right.

Q. (By Mr. Heafey): What transpired after that time?

A. Then on Tuesday—it was the first time that there was anyone at the State Farm that was familiar with the file and had [125] any knowledge of it. I called the office of the State Farm and I think I spoke to Mr. Hunt and told him of this question of policy coverage and advised him that we had been endeavoring to locate Claggett and hadn't heard from Claggett, that we had this, received this letter from Nebraska about a possible bringing of the car out here without permission and I thought that we should take a reservation of rights agree-

(Testimony of Leighton M. Bledsoe.)

ment from Claggett, that we should also interview the named insured and his wife and get statements from them about the circumstances involved, that we had not had time to brief the law of Nebraska with reference to the situation, and that we would undoubtedly have to get some lawyers in Nebraska to advise us about the legal aspects with reference to the policy coverage question and the law of Nebraska with reference to permissive use.

So he advised me he would—I believe he said he would telephone their Nebraska office and have them get Claggett in and try to get Claggett to get out here for trial. I told him the case was scheduled to go the next day and I didn't know whether I was going to be successful in getting a continuance or not, but do the best they could. In the meantime we were sending Mr. Dennis out to see if Claggett was at Richmond, and the following day I went to Martinez to make my motions.

Q. And was your motion to amend the answer granted? A. Yes, it was.

Q. And the amendment to the answer was then filed? [126] A. That is correct.

Q. And did you make a motion for the continuance of the case? A. I did.

Q. Was that motion granted?

A. It was.

Q. On what condition?

A. It was granted on condition that we pay the jury fees. I think the jury had been called

(Testimony of Leighton M. Bledsoe.)

and was there in the court room the day of the trial. And we were required to pay the jury and the expenses of the plaintiff, Mrs. Porter, in coming to the trial from southern California.

Q. Were those items paid for? A. Yes.

Q. And the case was continued to what date?

A. It was continued a week, I believe, to the following week, the 13th of July, 14th—I guess it was the 13th, because Monday is law and motion day in Martinez. It was the day following that, I think that was the 14th.

The Court: Talking about continuance, I advised you gentlemen I was going to leave at 3:30. I think we will have a continuance, but it won't be for a week. It will be until tomorrow morning at 10 o'clock.

During the adjournment bear in mind the admonition the Court has heretofore given you.

(Whereupon an adjournment as taken until Friday, January 6, 1950, at 10:00 o'clock.)

Morning Session, Friday, January 6, 1950,
at 10:00 o'Clock

The Clerk: Porter vs. State Farm Automobile Insurance Company, on trial.

The Court: Stipulated the jury is all present?

Mr. Heafey: Yes, your Honor.

Mr. Boyd: So stipulated, your Honor.

LEIGHTON M. BLEDSOE

resumed the stand, previously sworn.

Direct Examination

(Continued)

By Mr. Heafey:

Q. Mr. Bledsoe, at the recess last night I believe we were in Martinez. You were making a motion for a continuance of the trial date, of the case of Porter vs. Claggett. Now, at the time and while you were in court, was anything said about the coverage, or the possibility of lack of coverage?

A. Yes, there was. We made the motion in chambers of Judge Patterson's court and at that time Mr. Castro was present and I told the court that I had just picked up the file on July 2 and had been unable to make a contact with Claggett, that I had sent a man to try to locate Claggett and had been advised that he had gone back to his home in Minnesota, and I told the court at that time that a serious question of policy coverage had come up, that I felt that I should talk to Claggett and get something, [128] some more facts and that was one of the reasons why I wanted the continuance.

Q. And did you thereafter, and while you were in Martinez, have a conversation with Mr. Castro concerning that subject matter?

A. Yes, I believe that the question of coverage discussion came up with him the second time, the following week, when we went up there. I don't believe we discussed it very much on the first occa-

(Testimony of Leighton M. Bledsoe.)

sion, except in chambers of Judge Patterson's court.

Q. What conversation did you have with Mr. Castro at the time the continuance was requested?

A. Well, at that time I simply restated what I had told Mr. Crowley on Saturday the 2nd, we had received this letter from Nebraska, the Ginsburg firm, and advised him of the contents of the letter and told him that we had a serious question of coverage, that I was desirous of trying to locate Claggett and the Mehlin's, and that I was still, wanted full information of all the facts and wanted confirmation of the facts.

Q. Now, in the case pending at Martinez, of Porter vs. Claggett, at the time that case was set for trial had a jury been demanded?

A. Yes, it had.

Q. And by whom had a jury been demanded?

A. By Mr. Castro's office.

Q. Was that jury, trial by jury subsequently waived? A. Yes, it was.

Q. After the continuance was granted? [129]

A. I discussed the matter with Mr. Castro, according to my time sheets here, on the 10th of July, at which time he advised that he was going to waive the jury and wanted to know if I would also waive it. I told him at that time that I probably would waive it, but that it would depend on Claggett and have to get his consent to it and I wouldn't be able to say whether I could or not until he arrived and could confirm it with Mr. Claggett.

(Testimony of Leighton M. Bledsoe.)

Q. Did you subsequently talk to Mr. Claggett about it?

A. Yes, I did. I saw him on the 13th of July. He came out here by airplane and I saw him in my office on the 13th of July.

Q. Was that the first time you had talked to Mr. Claggett? A. Yes.

Q. And at that time did he sign a written agreement to the effect that he was willing to waive a jury?

A. Yes, I requested he do that. I discussed with him and asked him if he was willing to do it and he said he was.

Q. At that time did you have him sign anything additional?

A. Yes, I had him sign a non-waiver agreement.

Q. I will show you what purports to be a non-waiver agreement.

Have you seen this, counsel?

Mr. Boyd: No objection, counsel.

Mr. Heafey: All right.

Q. Dated—is that July 6 or July 13?

A. Well, I will have to explain this. This was prepared over [130] the weekend of July 3 and 4, at which time I was expecting Mr. Claggett to respond to my telegram and come in the office on July 6. I requested he come in on the 6th, so that was dated originally the 6th, and he didn't come on the 6th, because he wasn't in the state. When he did arrive it was on the 13th, so the date was

(Testimony of Leighton M. Bledsoe.)

written above the 6th to show the 13th is the actual date he signed it.

Q. It was signed on the 13th?

A. Yes, in my presence.

Mr. Heafey: We will offer this in evidence, your Honor, and ask it be marked with the defendant's next number.

Mr. Boyd: No objection.

The Court: Admitted.

The Clerk: Defendant's exhibit A in evidence.

(Whereupon the document referred to was received in evidence and marked defendant's exhibit A.)

Mr. Heafey: Could I read that to the jury now, your Honor?

The Court: Yes.

Mr. Heafey: (Reading):

(Testimony of Leighton M. Bledsoe.)

DEFENDANT'S EXHIBIT A

“San Francisco, California

“July 13, 1948

“Messrs. Dana, Bledsoe & Smith

440 Montgomery Street,

San Francisco, California

“Re: Bertha Lee Porter and Charles Earl Porter and John Richard Porter, minors, by and through Bertha Lee Porter, guardian ad litem, plaintiffs, vs. Duane R. Claggett, [131] Wilbur M. Mehlin, Marvin Mehlin, et al, Defendants.

“Gentlemen:

“This is to advise you that I agree that your firm, as attorneys and representatives of State Farm Mutual Auto Insurance Company, and also that any of your representatives and any representatives of State Farm Mutual Auto Insurance Company, may participate in any investigation, defense and/or adjustment of the case now pending between Bertha Lee Porter and Charles Earl Porter and John Richard Porter, minors, by and through Bertha Lee Porter, their guardian ad litem, plaintiffs, vs. Duane R. Claggett, Wilbur M. Mehlin, Marvin Mehlin, et al, defendants, which said case is now pending in the Superior Court of the State of California, in and for the County of Contra

(Testimony of Leighton M. Bledsoe.)

Costa, numbered therein 41468, and any such action heretofore taken, or to be taken, by you or by any of said representatives, is entirely without prejudice to the rights and defenses of State Farm Mutual Auto Insurance Company under its insurance policy numbered 72-064-ST-27, and any other insurance contract; and it is agreed that any such participation does not and will not constitute an admission of liability on the part of said State Farm Mutual Auto Insurance Company under said and any contract of insurance. [132]

“I likewise hereby waive any right that I have, or may have, to claim that the State Farm Mutual Auto Insurance Company has waived any right to deny liability under said and any contract of insurance.

“At the same time I in no way waive any of my rights against the State Farm Mutual Auto Insurance Company under said or any contract of insurance.

“Very truly yours,

“DUANE R. CLAGGETT.”

And beneath that is the following:

“I agree that a trial by jury may be waived.”

And signed by Duane R. Claggett.

(Testimony of Leighton M. Bledsoe.)

Q. Now, in that connection, Mr. Bledsoe, did you ascertain that the company had previously on the 9th of July, 1948, taken a non-waiver agreement from Mr. Claggett in Minnesota?

A. Well, yes. To lead up to that, I had requested the company to contact him and on contacting him to get a non-waiver agreement, that the local office did not know whether that had been obtained and when Claggett arrived I asked him if they had asked him to sign one. He said they had, but didn't have a copy of it, so I didn't know the contents of it, what its effect was, so I had him sign this other.

Q. I will show you what purports to be a non-waiver agreement signed on the 9th day of July, 1948, and I will ask you if you recognize the signature at the bottom of that agreement as [133] being the signature of Duane R. Claggett?

A. Well, I am not a handwriting expert, but all I can say, it looks like the same signature.

Q. Was the signature he put on the non-waiver agreement that you obtained, was that signed in your presence? A. Yes, it was.

Q. And does the other signature appear to be the same handwriting? A. Yes, it does.

Mr. Heafey: We will offer the other non-waiver agreement in evidence, too, your Honor.

The Court: Admitted.

The Clerk: Defendant's exhibit B in evidence.

(Testimony of Leighton M. Bledsoe.)

(Whereupon the non-waiver agreement referred to was received in evidence and marked defendant's exhibit B.)

Mr. Heafey: This reads as follows:

DEFENDANT'S EXHIBIT B

“Notice and acknowledgment of non-liability.

“It is hereby understood and acknowledged by and between the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and Duane Claggett that any action taken by the said insurance company in investigation and/or adjusting and/or defending any claim and/or handling any litigation for the said Claggett growing out of an accident involving Duane Claggett which occurred on or about October 31, 1947, at Richmond, California, shall not be construed as a [134] waiver of the right of the said insurance company to deny any and all liability to said Duane Claggett under any policy or policies insurance issued to Wilbur Marvin Mehlin. It is understood and acknowledged by and between the said State Farm Mutual Automobile Insurance Company and the said Duane Claggett that there is no obligation whatsoever on the part of the said insurance company to investigate and/or settle and/or defend any such claims or handle any such litigation for the said Duane Claggett and that the said insurance company has not admitted any liability to the said Duane Clag-

(Testimony of Leighton M. Bledsoe.)

gett in respect thereto. Dated at Mora, Minnesota, this 9th day of July, 1948.

“STATE FARM MUTUAL
AUTOMOBILE INSUR-
ANCE COMPANY,

“By JULIUS E. KUBIN, JR.,

“Acknowledged by Duane R. Claggett.”

Q. Now, Mr. Bledsoe, did you at any time during the course of any of the litigation ever confer with any of the Mehlin's? A. Never, no.

Q. Were the Mehlin's ever served with a copy of the complaint and summons which was to require an appearance by them?

A. No, they were not, at least they didn't tender any to us.

Q. Did you have a conversation with Mr. Castro at the time of trial with reference to policy coverage? [135]

A. Yes, after the trial was over Mr. Castro asked me about the coverage question and whether I thought it was a good point or not, and what our defenses were, and I told him I was not at that time to answer definitely about it, I still had to get the facts collected from the Mehlin's and I frankly told him I didn't know.

Q. Now, did Mr. Claggett appear for the trial?

A. Yes, he was there and testified.

Q. After the trial was over, did you continue to represent Mr. Claggett in a motion for a new trial? A. Yes, I did.

(Testimony of Leighton M. Bledsoe.)

Q. Why was that?

A. The reason was that this question had come up rather on the eve of the trial and we didn't feel that we could desert Claggett in the middle of the trial and leave him without attorneys, or with the need of getting new attorneys in the middle of the case, and I advised him that we were going to file a motion for a new trial and keep the time open in case he wanted to take an appeal and give him time to get other counsel if he so desired and also to give his other counsel time to look at the case and take it over if they wanted to.

Q. Now, did you ever contact the attorney by the name of Ginsburg who had written the letter that was dated in April of 1948, by telephone?

A. Yes, I did. [136]

Q. And when was that?

A. Well, that was after I had gotten the continuance from Judge Patterson against the—we were up there on the 7th of July and I telephoned Mr. Ginsburg in Nebraska during that week. It was before the trial actually came up and for the purpose of learning where the Mehlin's were and to find out if they would confirm the information that Mr. Ginsburg had supplied us in his letter and to ask him more about the facts and circumstances of the bringing of the car here to California.

Q. Did he tell you where the Mehlin's were at that time?

(Testimony of Leighton M. Bledsoe.)

Mr. Boyd: Your Honor, I think this is purely hearsay. We are getting into what Mr. Ginsburg may have told Mr. Bledsoe.

The Court: I think so.

Mr. Boyd: Object to it on that ground.

The Court: Sustain the objection.

Q. (By Mr. Heafey): Now, Mr. Bledsoe, did your file that was referred to you by the State Farm Mutual Auto Insurance Company before the receipt of the letter from Ginsburg in April, 1948, contain any information at all indicating that the automobile that was covered by the policy of insurance had been taken from the state of Nebraska without the permission of the named insured?

A. No, it did not.

Q. That was the first information you had concerning that? A. That letter, yes. [137]

Q. Now, aside from the letter from attorney Ginsburg, did you file, before that you hadn't any information that—well, I think you have substantially answered—your file did not contain any information indicating that the car was taken out of the state without permission? A. No.

Q. Now, did you ever at any time tell Mr. Castro that it was too late to get a reservation of rights from Mr. Claggett?

A. No, I think Mr. Castro is mistaken about that. I told him that we would not be able to contact Mr. Claggett, that we had tried to reach him and had not been able to for the purpose of getting

(Testimony of Leighton M. Bledsoe.)

a reservation of rights agreement and that we would have to wait until he came to the trial in order to get it.

Q. Did you also represent Mr. Claggett on the criminal proceeding?

A. No, he was represented by other counsel.

Q. The first time you saw Mr. Claggett was on the 13th of July, 1948?

A. That is correct, the first time he was ever in the office.

Q. Do you know when it was that he left California after the criminal proceeding?

A. Immediately after the criminal proceedings which were in March, 1948.

Q. Did you at any time ever talk to Mr. Mehlin? A. No. [138]

Q. Or Mrs. Mehlin? A. No.

Q. Or take any statements from them?

A. No. No statements in our file from them, either, until the statement that was taken on August 25, 1948, was taken back there in a question and answer form.

Q. Those are the statements we referred to yesterday?

A. Yes, they were taken after the trial of the case in Martinez.

Q. And some time in August of 1948?

A. August 25.

Q. I see.

Mr. Heafey: You may cross-examine.

(Testimony of Leighton M. Bledsoe.)

Cross-Examination

By Mr. Boyd:

Just a few question, Mr. Bledsoe.

Q. Who paid the traveling expenses and airplane expenses and so forth, for Mr. Claggett in coming from Minnesota to Richmond or to Martinez in testifying in this case?

A. The insurance company.

Q. And who paid for your services in the trial of the case in which you represented Mr. Claggett in Contra Costa County?

A. The insurance company.

Q. Is that likewise true for your services on the motion for the settling of the findings and motion for a new trial?

A. That is correct.

Q. You say that you wouldn't waive a jury until you obtained [139] Mr. Claggett's written consent; was that correct, sir?

A. Yes, that is the way I did it, had to do it, but have to get his consent and confirmation of it.

Q. You did get his written consent before you formally waived the jury? A. Yes.

Q. Did you get his consent before the answer was filed in his behalf by your office?

A. I don't know what you mean by that. Consent to what?

Q. To file the answer and to represent him.

A. Well, I assume that had been obtained by virtue of the fact he must have tendered the sum-

(Testimony of Leighton M. Bledsoe.)

mons and complaint to the insurance company. We were advised that he had been served with it and they sent the very summons and complaint that had been served on him to us, so we never questioned that. He wants some protection and otherwise wouldn't bring in the summons and complaint.

Q. But you obtained the summons and complaint direct from the insurance company, is that correct? A. That is correct.

Q. And when you filed the answer, rather when Mr. Dana's office, firm, filed the answer, admitting that the automobile was being driven by Claggett with the owner's permission, you didn't obtain Mr. Claggett's consent to do that?

A. Not directly, no. All we did was to look through the file [140] and see statements that had been obtained from Claggett in which he said he had Mrs. Mehlin's consent and the formal report which we had in the file that had been signed by Mrs. Mehlin in which she said she gave consent and that she was the wife of the named insured, and on the basis of that we assumed that the consent had been given.

Q. And when you filed the amended answer stating that Mr. Claggett was operating the car with the permission of Mrs. Mehlin, when you filed that answer in behalf of Mr. Claggett, did you have his consent to do that, sir?

A. I believe so, I think that he verified that amendment. I discussed that with him when he came out here.

(Testimony of Leighton M. Bledsoe.)

Q. Do you have a copy of the answer, the amended answer?

A. I have a verification in here, apparently by him, but I don't know whether that it was used or whether I verified it. I am not sure how that was handled. I see that I prepared one with my verification, July 6, 1948, and I prepared one for him to sign and whether I had signed that before he got here or not, I don't know.

Q. The answer, according to the copy of the pleading served on the plaintiff, Mr. Bledsoe, indicates that the verification of the second answer was made by Leighton M. Bledsoe, sworn to on July 6 of 1948 and signed on July 7, 1948.

A. Well, that was only in connection with the motion, wasn't it? Was that the proposed amendment that was being submitted to the [141] court for—along with our notice of motion? I think we may have filed after the leave was granted, may have filed our answer containing the verification of Claggett on it. I am not sure about that.

Q. I hand you the copy of the answer that—

A. Yes. Well, I assume that at the time we filed the motion I am sure that I verified it, because Claggett was not here at that time and we had to submit a proposed amendment to the court as part of our motion for leave to amend and that had to be made on the 7th of July, which was before Claggett got here and I know I discussed the matter with Mr. Claggett when he did arrive, as I had

(Testimony of Leighton M. Bledsoe.)

prepared a verification for him to sign. Now, whether I had him file another verification and another answer, I am not sure about that.

Q. Did you prepare the second answer or did Mr. Dana prepare it? A. I prepared it.

Q. You prepared the second? A. Yes.

Q. Now, at any time from the time that the file was first referred to your office in February of 1948 up until the first part of July, 1948, did you ever tell Mr. Claggett or anyone in your behalf tell Mr. Claggett that the amount of this suit was in excess of the policy limits of the State Farm Mutual Insurance Company and that he could obtain his own [142] attorneys if he so desired?

A. Oh, I don't think so. Usually those questions are decided by the insurance company as to what their policy is about giving notice. I don't see any letters in our office to him to that effect and I think that all we did was to send him a letter in March that the case had been set for trial in July and to make himself available to us.

Q. Do you have that letter available, Mr. Bledsoe, the copy?

A. I think so. Of course, at that time I think Mr. Claggett was being represented by these attorneys in Martinez.

Q. Do you have a previous letter to this one of March 13 relative to the——

A. Yes, here's one, March 4.

Mr. Boyd: At this time, your Honor, I would

(Testimony of Leighton M. Bledsoe.)

like to read these letters, with agreement of counsel, a letter dated March 4 of 1948 from the firm of Dana, Bledsoe & Smith to Mr. Duane Richard Claggett, 1106 Main Avenue, Richmond, California.

“Dear Mr. Claggett:

“Re: Porter vs. Claggett

“This is to inform you that the trial of the above-entitled action is set for Tuesday, July 6, 1948, in the Superior Court of Contra Costa County, at Martinez, California. In the meantime, plaintiff’s attorney and this office are making arrangements for an exchange of depositions and when a definite date and time for same have been [143] arranged we will advise you. We will keep in touch with you, but kindly keep this trial date in mind.”

On March 13, 1948, a letter to Mr. Claggett from Dana, Bledsoe & Smith:

“We previously informed you the trial in the above action would be held on July 6. We are now informed that due to a holiday the court will be unable to hear this case on that date and instead the matter is set for Wednesday, July 7, 1948. We will keep you informed.

“Very truly yours,”

Q. Did you at any time, Mr. Beldsoe, or your office at any time have any additional correspondence of any kind with Mr. Claggett?

A. After that date?

Q. Either before or after, sir.

(Testimony of Leighton M. Bledsoe.)

A. Well, he didn't answer those letters or communicate with the office about them and I don't believe that we had any more correspondence with him or any communication with him until he arrived here for trial. Just let me check my time sheets on that. I might be able to tell you fairly accurately. The time sheets are so small I can't find them half of the time.

Well, following the trial I think he went back to Minnesota and I wrote him, sent him a letter about the result of the motion for a new trial and telling him about the time he would have to take any further action in the matter if he wanted [144] to get counsel to represent him in the matter and advised him that the insurance company would take the position that the policy did not cover, which I had previously advised him in our conversation before trial. I made, explained the whole thing before trial.

Q. What was the date of that last letter, sir?

A. October 25, 1948.

Mr. Boyd: I have no further questions.

Mr. Heafey: That is all. Defendant rests, your Honor.

Mr. Boyd: Your Honor please, in rebuttal we would like counsel for the defendant to produce the copy of the application that was signed by Mr. Mehlin for this insurance policy that we made a motion before Judge Goodman, and that counsel product it. Do you have it here, counsel?

Mr. Bledsoe: Yes, here's the whole thing.

Mr. Boyd: May we introduce the entire matter in evidence?

Mr. Bledsoe: Yes, you don't need that opening letter.

Mr. Boyd: At this time, your Honor please, I would like to offer in evidence the photostatic copy of the affidavit signed by Mr. Mehlin for this policy of insurance.

The Clerk: Plaintiff's exhibit 2 in evidence.

(Whereupon the application for insurance was received in evidence and marked plaintiff's exhibit No. 2.)

Plaintiff's Exhibit No. 2

AUG 24 1947

State Farm Mutual Automobile Insurance Company of Bloomington, Illinois

PREMIUM DUE

On the basis of the facts below indicated, and on an inducement to insure, the following statements by him to be correct and truthful.

APPLICANT Wilbur Mehlin DATE OF BIRTH 8-23-1918
 HOME ADDRESS 210 No. 29th St. (Appl. Sign Here) (Print name of applicant here. Indicate if co-partnership, corporation or estate)
Lincoln Lancaster Nebr.
 automobile principally used? County Street or R. R. City County State
 applicant's occupation or business? Assembly man Purpose of Use? B. & P.
 address of employer? Cushman Motor Works, Lincoln (If married, woman give also husband's occupation or business)
 AGE, 22, 1947 TOWNSHIP _____ TERRITORY No. _____

NATIONAL STANDARD COMBINATION POLICY		FULL SERVICE POLICY EX	
	Membership	Premium	
INJURY LIABILITY			
PROPERTY DAMAGE LIABILITY			
COMPREHENSIVE (Including Fire & Theft)			
THEFT, STORM, THEFT			
CASH - 80%			
CASH - \$ _____ Deductible			
CASH PAYMENT COVERAGE	X X		
TOTAL			
LIMITS OF LIABILITY			
Ins otherwise specified the following limits of liability shall apply to the coverages indicated			
INJURY LIABILITY	\$10,000 ONE PERSON; \$20,000 ONE ACCIDENT		
PROPERTY DAMAGE LIABILITY	\$5,000 EACH ACCIDENT		
PAYMENTS	\$500 EACH PERSON		
CASH EXPENSE	80% OF ACTUAL EXPENSE		
COMPREHENSIVE (Including Fire & Theft)	ACTUAL CASH VALUE		
CASH - 80%	80% OF ACTUAL CASH VALUE		
CASH - Deductible	ACTUAL CASH VALUE less the amount deductible		
THEFT REIMBURSEMENT	AS PROVIDED IN THE POLICY		
CASH ROAD SERVICE	80% OF ACTUAL EXPENSE		
A - DAMAGE BY THE AUTOMOBILE		B - DAMAGE TO THE AUTOMOBILE	
BODILY INJURY LIABILITY		COMPREHENSIVE (Including Fire & Theft)	
PROPERTY DAMAGE LIABILITY		COLLISION - 80%	
MEDICAL PAYMENTS		THEFT RENTAL REIMBURSEMENT	
BAIL BOND EXPENSE		EMERGENCY ROAD SERVICE	
SPECIAL SERVICE POLICY			
Identical with the Full Service Policy EXCEPT the Collision coverage part for auto loss in excess of \$ _____ Indicate \$25 \$50, or \$100 Deductible			
STANDARD SERVICE POLICY			
Identical with the Full Service Policy EXCEPT there is no Collision coverage			
BASIC SERVICE POLICY			
Provides protection for damage by the automobile only - Medical Payments and Liability			
COMPREHENSIVE FARM LIABILITY			
FARM EMPLOYER'S LIABILITY			
COMPREHENSIVE RESIDENCE AND PERSONAL LIABILITY			
TOTAL			

Description of the automobile and the facts respecting its purchase are as follows

Name and Model	Year of Model	Body Type: Truck Load Capacity or Factory Gross Weight	No. of Cyls.	Serial Number	F.O.B. List Price or Delivered price at Factory
Ford	1936	2-dr.	8	Motor Number 2922886	520.00
Automobile is in good condition except as follows:					
Actual Purchase Cost		Purchased		New Used	If Automobile is Mortgaged What is Amount of Mortgage?
350.00		Month Year			
		1946		X	

When was automobile purchased? Lester F. Brown Address Lincoln, Nebraska 821 S. 18
 Name of mortgagee First National Bank Address Lincoln, Nebraska
 Do you have any other insurance on the described automobile? NO If so: Kind _____ Amount \$ _____
 Company _____ Expiration Date _____
 Has insurer cancelled or refused to renew any kind of automobile insurance for the applicant during the past year? NO If so, explain fully: _____
 Has license, permit, operators license or registration been revoked? _____
 How many accidents or losses has applicant had in past two years? NO Give details _____
 Does applicant live on and operate a farm of five acres or more? NO What is Applicant's race and color? White
 Is applicant, or any person operating described automobile, have any physical or mental defects of any kind? NO Explain fully _____
 Name and Age of other drivers Authorized

AGENT'S SIGNATURE Julius G. Ludlam 3661
Fred Deyke 21

AGENT-STAMP NAME, ADDRESS HERE
 NOTIFICATION IS FOR COMPREHENSIVE LIABILITY OR INSURANCE ON A TRUCK THE QUESTIONS ON THE REVERSE SIDE OF THIS APPLICATION MUST ALSO BE ANSWERED

ANSWER ALL QUESTIONS—IF NECESSARY EXPLAIN BY LETTER

215 B

2107	Inc	Nebr	Lanc	Asse	2-22	Ford	51-01	8-22	CAACJ	2 8 20	License On	REIMBATED	FINANCE	TO	ADORE	TRANS	7 AMOUNT	P.P. PA
------	-----	------	------	------	------	------	-------	------	-------	--------	------------	-----------	---------	----	-------	-------	----------	---------

COMPREHENSIVE FARM AND EMPLOYER'S LIABILITY

DESCRIPTION OR LOCATION OF ALL FARMS OWNED BY, RENTED TO, OR IN CHARGE OF NAMED INSURED OR SPOUSE TO BE INSURED HEREUNDER.	Exact Location	Type of Farming	Acres	Membership Fee	Premium
COVERAGE Comprehensive Farm Liability Farm Employer's Liability					
	Maximum No. of Employees	Estimated Number of Employee Months	Rate Per Employee Month		

A. Describe fully any custom or contract work performed by the insured, either on or off the premises such as threshing, combining, corn picking, hay baling, feed grinding, etc. (Be sure to cover nature of work, number of employees, annual dollar volume and length of season.)

B. If relatives are employed and are to be covered as other employees under Farm Employer's Liability Coverage and have been included in the estimated number of employee months, give names of such relatives employed

COMPREHENSIVE RESIDENCE AND PERSONAL LIABILITY

DESCRIPTION OR LOCATION OF ALL RESIDENCES OWNED, RENTED OR IN CHARGE OF NAMED INSURED OR SPOUSE TO BE INSURED HEREUNDER.	Description of House or Apartment	Location	No. of Present Employees	Membership Fee	Premium
COVERAGE Comprehensive Residence and Personal Liability					

FOLLOWING INFORMATION REQUIRED WHEN APPLYING FOR EITHER OF ABOVE COVERAGES

The names of additional insureds, other than the applicant, spouse, and minor children, to be covered hereunder are

Describe fully any business or occupational pursuit conducted on the above designated premises, such as kind, manufacture, retail or wholesale, number of employees, annual dollar volume if seasonal, number of months, etc.

The interest of the insured in the premises is (owner or tenant).

The insured occupies the entire premises, except as follows

No explosives will be made, kept, sold or used on the premises, except as follows

Are the premises in good repair and condition?

Has any insurer cancelled or refused to renew any similar insurance during the past two years?

TRUCK INSPECTION REPORT

THIS REPORT IS TO BE MADE ON EVERY APPLICATION FOR INSURANCE ON A TRUCK AND EVERY QUESTION MUST BE ANSWERED

What was combined cost of chassis and body when new? If so, how often?

truck usually driven by the owner? If so

Who besides the owner drives the truck?

What is driver's age? What is driver's rate or class?

truck used exclusively in connection with the operation and maintenance of policyholder's farm?

truck used for hauling farm products or livestock?

so, for whom besides policyholder?

truck used in hauling other commodities?

so, kind and for whom?

truck used for retail delivery of dairy products?

truck used for general hauling, delivery, express or transfer? If so,

plain fully

truck is used for hire, explain to what extent

Where is the truck regularly kept?

truck operated beyond a radius of 50 miles of garage location?

Applicant's protection begins with EFFECTIVE DATE shown in the APPLICATION.

Give the names of towns or cities more than 50 miles away to which trips are made

Is any night driving done? If so, to what extent?

How many trucks are owned and/or operated by policyholder?

Are all trucks insured for liability and property damage?

Is a Public Service Permit required for any truck owned or operated by policyholder?

Is a trailer used in connection with operation of truck?

If so, explain if a tractor trailer or truck and trailer.

What capacity of trailer in tons? How many wheels has trailer?

What is length of trailer?

Name of trailer? Serial Number?

What was cost of trailer when new? New purchase date

Date

Signature of Policyholder

Agent

Entered and Filed January 6, 1949.



Mr. Boyd: I don't desire to read the entire affidavit, your Honor. I think it may be stipulated, may it not, counsel, [145] that the application for this policy of insurance discloses that at the time the insurance was applied for there was disclosed the fact that a mortgage existed on this automobile to the First National Bank of Lincoln, Nebraska.

Mr. Heafey: No question about it.

Mr. Boyd: Plaintiff rests, your Honor.

Mr. Heafey: Just one moment. May I have one second, your Honor?

Mr. Boyd: Your Honor please, it has been stipulated between counsel that the criminal proceedings referred to against Claggett were as a result of the manslaughter charge resulting from the accident and had nothing to do with any theft of the automobile or anything of that character.

The Court: Nothing to do with what?

Mr. Boyd: With the theft of an automobile or any criminal charge that would even indicate that Claggett had taken the car. The criminal proceedings referred to were entirely the result of the police action as a result of this action in which Mr. Porter was killed, that it was a manslaughter charge.

The Court: That so stipulated?

Mr. Heafey: Yes, your Honor. Counsel, I notice here among the papers sent out, a non-waiver agreement signed by Mehlin. Any objection to introducing that in evidence to complete the record?

Mr. Boyd: No. [146]

Mr. Heafey: We will offer in evidence, your Honor, a non-waiver agreement which is in the same form as that heretofore read, signed by Mr. Claggett.

The Court: This is signed by Mr. Claggett. Which form do you mean?

Mr. Heafey: The form that was signed in Minnesota.

The Court: I see.

Mr. Heafey: Not the letter.

The Court: That is exhibit A?

Mr. Heafey: Yes, and this was signed by Wilbur M. Mehlin and Carol Doris Mehlin at Lincoln, Nebraska, on the 25th day of August, 1948. We offer that in evidence.

The Clerk: Defendant's exhibit C, in evidence.

(Whereupon the non-waiver agreement was received in evidence and marked defendant's exhibit C.)

DEFENDANT'S EXHIBIT C

Notice and Acknowledgment of Non-Waiver of Rights

It is hereby understood and acknowledged by and between the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and Wilbur Mehlin and Mrs. Carol D. Mehlin that any action taken by the said Insurance Company in investigating and/or attempting to adjust, and/or defending any claim, and/or handling any litigation

growing out of an accident involving: Bertha Lee Porter and others which occurred on or about Oct. 31, 1947, at Berkeley, California, shall not be construed as a waiver of the right of the said Insurance Company to deny liability at any time under any policy or policies of insurance issued to Wilbur Mehlin and Mrs. Carol D. Mehlin. Nor shall the acknowledgment of this notice be considered a waiver of the rights, under said policy or policies, of the said Wilbur Mehlin and Mrs. Carol D. Mehlin.

Dated at Lincoln, Nebr., this 25th day of August, 1948.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY.

Witnessed:

By /s/ GEORGE HEALEY.

Acknowledged by:

/s/ WILBUR M. MEHLIN,

/s/ CAROL DORIS MEHLIN.

Non-Waiver

[Endorsed]: Filed January 6, 1949.

Mr. Boyd: Now, at this time, your Honor please, I have two motions I would like to make. First, that the affidavit of Paul Dana that has been introduced in evidence be stricken from the record

and the jury instructed to disregard the contents thereof on the grounds that it is purely hearsay and the plaintiff has not had the right of cross-examination.

The Court: Well, I will deny that motion.

Mr. Boyd: Would also like to move at this time to strike all the evidence pertaining to the mortgage of the automobile by the insured Mehlin to the First National Bank on the ground [147] that there is no evidence in this record as to whether or not the mortgagor did or did not object or permit the plaintiff—the wife of the defendant, Mrs. Mehlin, to remove the automobile from the state of Nebraska.

The Court: What have you got to say about it?

Mr. Heafey: That was related to the proposition of intent, to show that—rather to the matter of permission and not show simply that at the time the policy was taken out there was a mortgage that was disclosed. It was at the time the car was taken out of the state there was an existing mortgage on that, a chattel mortgage on the car at the time it was taken out of the state, which would negative, in a sense, the giving of permission by Mr. Mehlin, because to do so would constitute a crime.

Mr. Castro: That is not a correct statement of the law.

The Court: Your answer to that proposition may be, Mr. Heafey, that as you understand the law of the state of Nebraska, was that it was a

crime to take the automobile out of the state without the permission of the mortgagor?

Mr. Heafey: That is right, your Honor.

The Court: There is no evidence here that the mortgagor refused such permission.

Mr. Boyd: That is right, no evidence one way or the other they either gave permission or refused to give permission.

Mr. Heafey: There is really evidence—there wasn't, [148] your Honor, because counsel stipulated that the record shows the charges were dismissed for insufficiency of the evidence, which we feel would be evidence, no question about the taking it out of the state——

The Court: I will let the evidence stand. You both can, you both can argue if you want to. The jury is fully advised that the law of the state of Nebraska didn't prohibit taking the automobile out of the state even though it was under a chattel mortgage, unless the mortgagor refused to consent thereto.

Mr. Heafey: I wonder if it isn't the other way, you can't take it out unless you have the prior consent?

The Court: That is what I mean. In other words, the law of Nebraska is that is that you couldn't take the chattel mortgage, the automobile, out of the state unless you had the consent of the chattel mortgagor. There is no evidence in this case one way or the other whether or not the chattel mortgagor gave his consent.

Mr. Boyd: We have nothing further, your Honor.

The Court: Yes. Well, you gentlemen for the defense, have you anything further?

Mr. Healey: No, your Honor, except we have a motion we would like to argue which will take a little time.

The Court: All right, then. Ladies and gentlemen, you will be excused from the court room and be asked to return to [149] the jury room to be sent for. In the meantime, please bear in mind the admonition I have heretofore given you. You may leave the court room now.

(The jury retired from the court room.)

Mr. Bledsoe: At this time the defendant moves for a directed verdict on the following grounds:

1. That there is no evidence in this case to show that the insurance policy extended coverage to Claggett, who is the only person against whom a judgment has been obtained.

2. That there is no evidence that Wilbur Mehlin, the named insured under the policy ever gave permission, either express or implied, to Claggett to use the car at the time and place of the accident.

3. The evidence is conclusive as a matter of law that Claggett was using and driving the car at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

4. The evidence shows that the declaration of the principal place of use and garaging was violated and constituted a material breach of the policy in that it shows that the vehicle was brought to the state of California with the intention of remaining here and using it in California, a place remote from the place declared in the policy to be the principal place of use and garaging.

5. That no acts or omissions by the defendants or any [150] of its agents have been shown to amount to an estoppel within the meaning of estoppel under the law.

6. No change in position in any material respect or at all has been shown by the plaintiff or on the part of the plaintiff or on the part of the assured or any assured in reliance of anything that the defendant did or did not do or that any of its agents did or did not do.

7. That there has not been anything shown prejudicial to the plaintiff or to the assured so as to bring them within any estoppel rule.

8. There has been an entire failure of proof and there is no evidence to show that the defendant or any of its agents had knowledge of all the facts at the time of the alleged acts or omissions claimed to constitute a waiver or an estoppel.

9. That there has been no evidence of any waiver by the defendant or by any of its authorized agents.

10. There has been no evidence of any estoppel

established on the part of any defendant or any of its agents.

11. That there has been no proof or evidence of any authority shown in any agent of the defendant to waive defenses or to estop the company in connection with any of the acts or failures to act on the part of the defendant claimed to amount to a waiver or an estoppel.

12. There has been no authority shown in any agent of the company that dealt with Mr. Castro or with the plaintiff or [151] the assured to bind the company, in any matters amounting to a waiver of the policy provisions or an estoppel against the company or to effect a change in any of the terms of the policy.

13. That there is no evidence of any written endorsements on the policy waiving any of its defenses or estopping the company to claim the defenses now raised.

14. There is no evidence of any waiver or of any estoppel with reference to the defense of the principal place of use and garaging as being a violation of the declaration of the policy.

I think that covers the grounds.

(Whereupon followed argument on the motion for a directed verdict.)

(Whereupon the ruling of the Court was as follows:)

The Court: Well, I prefer to proceed and let you gentlemen argue it to the jury.

I will outline to you, required under the rules, what the instructions will cover. They, of course, will cover the questions that—besides the general instructions, in order to recover in this case the plaintiff has the burden of proof showing it is an implied or expressed permission on the part of the named insured for Claggett to use that car the night of the accident. Then there will be the definition of implied permission, and then I will instruct the jury there isn't a presumption, merely an inference which can be dispelled by [152] virtue of having possession of the car, following the Ingstrom case. Then I will instruct the jury that the plaintiff is contending that the provision about permission is a condition and that the insurance company, by its conduct, has waived that condition, is estopped to assert it, then I will give them the rules of evidence, rules of law with respect to estoppel and waiver, including the statement in the instructions that there must be knowledge on the part of the person who is claimed to have waived, claimed to have been estopped, that that knowledge may be constructive or actual, and then I will give them the instruction to the effect that anything that this—that Mrs. Porter stands in the shoes of Claggett and that anything that Claggett did can bind her and that particularly after it was done and if there was any estoppel in this case it must have arisen out of facts which occurred previous to the signing of these waivers. And furthermore, the burden is

upon her to show, in order to prove an estoppel or a waiver, that she suffered some change of position from the acts of the defendant. Generally I am telling you those things so that you can have them in mind in your arguments to the jury.

Let us get the jury back.

Mr. Bledsoe: One thing that occurred to me that I forgot about, that is an additional ground, that the evidence shows that the policy provision, the declaration about principal place of garaging and use has been violated and [153] constitutes a violation of the terms of the policy. I don't know that I recall I included that in my grounds.

Mr. Castro: Yes, you did.

The Court: You included that in your instructions, but I have eliminated any reference to that because it doesn't seem to be an issue in this case.

We will take a recess for ten minutes.

Mr. Bledsoe: For the record, are you reserving ruling on the motion for directed verdict?

The Court: No, I am denying it.

(Brief recess.)

(The following proceedings were had in the presence of the jury.)

The Court: Proceed with your opening argument.

(Whereupon argument to the jury was made by Mr. Boyd.)

The Court: We will now take an adjournment, ladies and gentlemen of the jury, until a quarter

of two and in the meantime during the recess will you bear in mind the admonition that I have heretofore given you.

(Whereupon an adjournment was taken until 1:45 p.m. this date.)

* * *

[Endorsed]: Filed April 25, 1950. [154]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL.

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorneys for the Appellant, to wit:

Complaint and Demand For Trial by Jury.

Answer of Defendant The State Farm Mutual Automobile Insurance Company to Complaint—Contains Exhibit “A.”

Verdict.

Judgment on Verdict.

Notice of Motion for Judgment and of Motion for New Trial.

Minute Order of March 21, 1950—Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict, Order Denying Motion for New Trial.

Memorandum Opinion.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

Notice of Denial of Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

Plaintiff's Exhibits Nos. 1 and 2.

Defendant's Exhibits Nos. A, B and C.

Reporter's Transcript for January 4, 5 and 6, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of April, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12,531 United States Court of Appeals for the Ninth Circuit. State Farm Mutual Automobile Insurance Company, a Corporation, Appellant vs. Bertha Lee Porter, as Special Administratrix of the Estate of Charles E. Porter, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,531

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY, a Corporation,
Appellant,

vs.

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely on the following points:

1. The evidence is insufficient as a matter of law

to establish that the insurance policy extended coverage to Claggett, who is the only person against whom a judgment was obtained in the tort action.

2. The evidence is insufficient as a matter of law to establish that Wilbur Mehlin, the named insured under the policy, ever gave to Claggett permission, either express or implied, to use the vehicle described in the policy at the time and place of the accident.

3. The evidence established as a matter of law that Claggett was using and driving the vehicle described in the policy at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

4. The evidence shows, as a matter of law, that there was a material and substantial breach with respect to the declaration of principal place of use and garaging described in the policy and shows, further, that the vehicle described in the policy was brought to the State of California for the purpose of being permanently used and garaged in said state at a place remote from the place declared in the policy to be the principal place of use and garaging.

5. The evidence shows, as a matter of law, that no acts or omissions by appellant or defendants or any of their agents amounted to or constituted an estoppel or established facts sufficient to estop appellant from denying liability under the policy.

6. The evidence shows, as a matter of law, that neither appellant nor anyone on its behalf performed or failed to perform any act which in any way caused any change of position in any material

respect by appellee or anyone on her behalf or on the part of the assured or any assured or anyone on behalf of any such assured.

7. The evidence is insufficient as a matter of law to show that appellee or the assured or anyone on their behalf, respectively, has been in any way prejudiced by any act of appellant or anyone on its behalf.

8. The evidence is insufficient as a matter of law to show, and there has been an entire failure of proof to show, that appellant or anyone on its behalf had knowledge of all material facts at the time it, or anyone on its behalf, performed any of the acts or omissions claimed by appellee to constitute (i) a waiver by appellant of any defenses under the policy or (ii) an estoppel of appellant to deny liability under the policy.

9. The evidence is insufficient as a matter of law to show any waiver by appellant or anyone on its behalf.

10. The evidence is insufficient as a matter of law to show any estoppel on the part of appellant or anyone on its behalf.

11. The evidence is insufficient as a matter of law to establish any authority in any agent or claimed agent of appellant to waive any defenses of appellant under the policy, or to estop appellant in connection with any claimed acts or failures to act on the part of appellant, or anyone on its behalf.

12. The evidence was insufficient as a matter of law to establish that any written endorsements on

the policy waived any defenses or constituted any estoppel of appellant.

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED BY APPELLANT TO BE NEC-
ESSARY FOR CONSIDERATION OF THE
APPEAL

Appellant designates, pursuant to Rule 19 of this Court, the following parts of the record deemed necessary for consideration of the appeal:

1. Complaint.
2. Answer.
3. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
4. The verdict of the Jury and Judgment entered thereon.
5. Motion of Defendant The State Farm Mutual

Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

6. Minute order denying motion of defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Memorandum Opinion of the trial court filed March 21, 1950.

8. Reporter's Transcript.

Note: The Reporter's Transcript refers to but does not include the text of certain depositions introduced in evidence and read to the jury; in order that such depositions may be printed as part of the Reporter's Transcript, we have filed herewith a document entitled "Designation of Page Sequence to be Used in Printing Reporter's Transcript and Depositions Admitted in Evidence" indicating the order in which the respective pages of the Reporter's Transcript and of the depositions should be printed.

9. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

10. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

11. Designation of Parts of Record Deemed by the Appellant to be Necessary for Consideration of the Appeal.

12. All other records required by the provisions

of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,

Attorneys for Appellant.

Receipt of Copy Attached.

[Endored]: Filed May 5, 1950.